ERNEST
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STUDIES

IN THE

CONSTITUTIONAL HISTORY OF TENNESSEE

BY

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PREFACE.

The first edition of this book having been exhausted, I have decided to publish this revisal. I have called it a revised edition, because, while the substance of the first issue has been retained, it is presented, usually, in changed form, and, frequently, in different relation; and because of the large amount of new matter that has been added.

Much labor has been devoted to the preparation of this edition. The chapter on the Watauga Association contains the latest results of the researches of students of the history of Tennessee, and the legislation of North Carolina in regard to the State of Franklin is presented in detail, I believe, for the first time. The journals of the several Conventions have been re-read with care, and the minutes of the General Assembly, and the old statute books and Court reports and records have received long and laborious examination. The difficulties attending this last line of investigation, in a State where no systematic effort has been made to preserve the materials of history, can be understood, only by those who have tried it. It is my good fortune to be acquainted with the living members of the Convention of 1870 and from several of them I have received original information of great value. I have made much use of Iredell's compila-

tion of the old statutes of North Carolina which, fortunately, is indexed, but frequently I could find only the captions of the Acts that I was most anxious to read, and this made further, and often unavailing research, necessary. The examination of the voluminous Colonial Records of North Carolina, was made page by page, without the aid of an index. The Virginia State papers are indexed, and afford much valuable information especially as to the Transylvania Treaty at Sycamore Shoals, and as to the State of Franklin. Scott's Edition of the laws of Tennessee and North Carolina has been of more service than any other single publication, and fortunately it is both comprehensive and trustworthy. In writing of the struggle over the settlement of the State debt, I have relied, in part, upon knowledge acquired by personal participation in the affairs described. I may claim fairly that the book is based upon original records in all material respects.

I am not unconscious of the peril of writing of the events of the last forty-five years, but the work would have been incomplete without the consideration of that period, and I have endeavored to be fair in all respects. I have regarded it as a duty to discuss frankly the insufficiency of the Constitution of 1870, for the present needs of the State, and to criticise freely the excessive conservatism of the people in retaining it so long.

I am indebted for valuable assistance to Mrs. John C. Brown and Mr. W. S. Morgan of Nashville;

the late Hunter Nicholson, Judge Henry R. Gibson, and Hugh L. McClung, Esq., of Knoxville; Hon. P. G. Fulkerson of Tazewell, Tenn.; Hon. James D. Porter of Paris, Tenn.; Hon. Joseph B. Heiskell of Memphis, Tenn.; Dr. Eben Alexander of the University of North Carolina, and Dr. John S. Bassett.

Knoxville, Tennessee,
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TABLE OF CONTENTS.

CHAPTER I.
THE WATAUGA ASSOCIATION (1772-1777) 1

CHAPTER II.
CUMBERLAND (1780-1783) 32

CHAPTER III.
FRANKLIN (1784-1788) 46

CHAPTER IV.
NORTH CAROLINA INSTITUTIONS 77

CHAPTER V.
TERRITORIAL GOVERNMENT (1790-1796) 104

CHAPTER VI.
THE CONSTITUTION OF 1796 (1796-1835) 130

CHAPTER VII.
THE CONSTITUTION OF 1796—*Continued* (1796-1835) 159

CHAPTER VIII.
THE CONSTITUTION OF 1834 (1835-1870) 191

CHAPTER IX.
THE CONSTITUTION OF 1834—*Continued* (1835-1870) 214

CHAPTER X.
INTERNAL IMPROVEMENTS AND THE STATE DEBT 241

CHAPTER XI.
SECESSION AND RECONSTRUCTION 264

CHAPTER XII.
THE CONSTITUTION OF 1870 294

CHAPTER XIII.
THE CONSTITUTION OF 1870—*Continued* 325

APPENDIX 355

STUDIES

IN THE

CONSTITUTIONAL HISTORY

OF TENNESSEE

CHAPTER I.

THE WATAUGA ASSOCIATION.

1772-1777.

The Valley of East Tennessee lies between the Cumberland Plateau, on the west, and the central ranges of the Appalachian Mountains, on the east, and extends across the State of Tennessee from Alabama to Virginia. The principal river of the upper valley was known, formerly, as the Holston. The Tennessee River, originally, was formed by the Holston and the Little Tennessee, the junction being about thirty miles southwest of the City of Knoxville, but capricious modern legislation has shorn the Holston, more than once, of its proper proportions, and has extended the Tennessee northward almost to the Virginia line. The Holston is formed by the confluence of several

branches, all rising among the hills of southwestern Virginia. The southern and largest branch enters Tennessee about twenty miles west of the North Carolina line, flowing first southwestwardly, and then northwestwardly to a junction with the northern branch, near the Virginia line, after which, the general course of the main stream is southwestward. The Watauga, "the river of islands," deriving its waters partly from North Carolina, forcing its way westward through the highest mountains east of the Mississippi, and flowing across the northeastern corner of Tennessee, almost parallel to the Virginia line, is the most important affluent of the south branch of the Holston. The Nollichucky, like the Watauga, heads in North Carolina, and, after making its way into Tennessee, flows for a space, almost parallel to the Watauga, fifteen or twenty miles south of it, and then, turning abruptly southward, joins the French Broad. The events to be related in this chapter occurred along the Holston, the Watauga, and the Nollichucky. The course of the south branch of the Holston, after crossing the Tennessee border, is approximately, though never exactly, parallel to the line between that State and Virginia. We shall see that at one time it was regarded as a part of the boundary between Virginia and that portion of North Carolina which, later, became Tennessee, and this was true also of the main stream for some distance. The first settlements in Tennessee were north of the Holston, but we are more directly con-

cerned, at present, with the second and later group, which was established on the Watauga and Nollichucky Rivers, south of the Holston. All these settlements were parts of the Scotch-Irish movement. We must recall that the Covenanter immigration began to assume large proportions in the second quarter of the eighteenth century. The Covenanters landed in this country principally at Charleston and at Philadelphia. The coast lands were already occupied, and as the English possessions extended but little farther south than Charleston, they went from that place to the piedmont lands of the two Carolinas, and having reached the mountains, which then formed the Carolina frontier, their course was turned northward. From Philadelphia their advance was to western Pennsylvania, and thence down either side of the Blue Ridge. The large and indefinite territory known as Augusta County, Virginia, received great numbers of them, and at the beginning of the year 1768, the Wolf Hills or Abingdon group of settlements, within twenty miles of the Carolina border, formed the advance guard of the Covenanter migration west of the Blue Ridge. East of the mountains the two streams, starting respectively from Pennsylvania and Carolina, met at about this time. The valley Covenanters were eager to press on down the Holston and the conditions east of the mountains required that the line of advance be deflected westward across the Alleghanies. Upper East Tennessee, toward which both lines of migration

now led, was not an inhabited country. The Cherokees claimed it, and probably their claim was better founded than any other. The Six Nations also claimed, and, as we shall see, assumed to convey, a portion of it to Great Britain, but neither the Cherokees, nor any tribe of the Northern Confederation, actually occupied it. The Six Nations dwelt hundreds of miles to the north, and the towns of the Cherokees, west of the mountains, were in the southeastern corner of Tennessee and the adjacent territory on the south. It was because upper East Tennessee was thus uninhabited that Roosevelt describes it, correctly, as the point of least resistance on the western frontier in the year 1768.

Until that year the well known royal proclamation of 1763 was a legal bar, though not an effective one, to the advance of the whites from Virginia and North Carolina.

It is probable that the bar would ere long have become wholly ineffective, if it had not been removed, but in the year 1768 occurred two treaties with the Indians, which were regarded as opening northern East Tennessee to settlement. The first of these was the treaty between Stuart, the British Superintendent of Indian Affairs in the south, and the Cherokees, at Hard Labour, South Carolina, in October, 1768, by which the western boundary of Virginia was declared to be a line extending northeastward from the unlocated point where the northern line of North Carolina

intersected the Cherokee hunting grounds, about thirty-six miles east of Long Island in the Holston River, to Chiswells Mine on the Kanawha River, and thence, down that stream to its junction with the Ohio. By this treaty the agent of the British Government, distinctly recognized the title of the Cherokees to upper East Tennessee. The second treaty was that of Fort Stanwix, New York, held in November of the same year, and conducted for the British by Sir William Johnson, one result of which was the unwarranted conveyance to the Crown, by the Six Nations, of all the lands lying between the Cherokee or Hogohegee (Holston) and Ohio Rivers, thus making the Tennessee and the Holston boundaries of Virginia.[1]

In 1770, the Cherokees complaining of continued encroachments by the whites, a new treaty was entered into at Lochaber, South Carolina, by which the outer boundary of Virginia was moved west of the line established at Hard Labour, beginning on the south bank of the Holston, six miles east of Long Island, and running thence a direct line, northward, to

[1]Virginia had granted lands within the limits of Tennessee as early as 1753. (See Iredell's Statutes of North Carolina, page 317.) The effect given to the treaties of 1768 appears in several ways. In January, 1769, the Governor of Virginia received a petition for a grant of 20,000 acres of land at the mouth of Cumberland River (Calendar of Virginia State Papers, volume I, page 260.) In December of the same year there were applications for 60,000 acres at Cumberland Falls, and 40,000 acres on Powell's River (Calendar of Virginia State Papers, volume I, page 262.)

the mouth of the Kanawha. The great triangle of land thus ceded to Virginia, extending northward over two parallels, and westward over almost two meridians, reached southward into Tennessee, or North Carolina, as it then was, crossing the line with the south fork of the Holston, running down that stream to within six miles of Long Island, and thence recrossing the boundary in a line bearing a little east of north. The town of Blountville, in Sullivan county, stands almost in the center of a triangle cut off by the North Carolina or Tennessee line, at the southwest corner of this cession. It may be that this treaty was regarded, erroneously, as vesting in Virginia title east of the Holston as far south as the Nollichucky River, for a letter from Jacob Brown has been preserved showing that in 1771 he bought land on that stream supposing it to be in Virginia.[2]

The treaty of Lochaber marks, approximately, the date of the first settlements south of the Holston, although there were white men in the Watauga Valley as early as the winter of 1768-9. The natural line of extension of the settlements was from Virginia down the Holston Valley, and not from North Carolina across the mountains, but the conditions described, and other causes, produced a considerable immigration from North Carolina, although the majority of the Holston and Watauga settlers undoubtedly came from Virginia.

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[2]Colonial Records of North Carolina, volume X, page 835.

Probably all the settlers south of the Holston believed that they were in Virginia, by virtue of the treaty of Lochaber, but in 1771 an experimental survey was made by Anthony Bledsoe, which indicated the true location of the North Carolina line, and by a treaty entered into in 1772, the boundary was fixed at a line running west from White Top Mountain, in latitude 36 degrees and 30 minutes. Nevertheless, as there was no complete survey of this line, it was believed still that the north-Holston settlers were in Virginia, and they were actually under her dominion until the line was officially surveyed westward in 1779. Consequently they did not join the Watauga Association.[3]

At the date of the treaty of 1772, the Watauga settlement was growing rapidly and Browns, on the Nollichucky, had been established.

As it was now clear that the Watauga people were in the Cherokee Country, the Indian agent, Cameron, demanded their removal, but the Cherokees were willing for them to remain, provided they encroached no farther, and very soon thereafter, they leased their lands from the Indians, for a term of ten years, thinking, probably, that this course did not violate the proclamation of 1763. It was not long, however, until further trouble arose, for on the twenty-second of February, 1774, William Ogilvy,

[3]American Historical Magazine, volume III, page 117; article by A. V. Goodpasture.

writing for Stuart, Superintendent of Indian Affairs, to Governor Martin, of North Carolina, said: "That Nation is still extremely uneasy at the encroachments of the white people on their hunting grounds at Watauga River, where a very large settlement is formed, upwards of fifty miles beyond the established boundary, and I am apprehensive that it consists of emigrants from your Province."[4]

On the twenty-fifth of April, following, Governor Martin issued a proclamation informing the Watauga settlers that they had violated the most solemn treaties, and had given "just umbrage" to the Indians, and requiring that they retire immediately from the Cherokee country, otherwise to expect no protection from His Majesty's government.[5]

The settlers did not for a moment consider a proceeding so much opposed to their pride, to their interests, and to their convictions of right, and conditions remained unchanged until the spring of 1775.

On the seventeenth of March, 1775, Henderson & Company made their celebrated Transylvania purchase from the Cherokees at Sycamore Shoals, on the Watauga River, and two days later the Watauga settlers converted their lease into a purchase, and took a deed from the same body of Indians. The Watauga deed begins at a point on the Holston, six

[4]Colonial Records of North Carolina, volume IX, pages 825-6.

[5]Colonial Records of North Carolina, volume IX, page 982.

miles east of Long Island, and the second and third calls carry the line southward to the Blue Ridge, along which it runs northward to the Virginia line, and thence down the south branch of the Holston River to the beginning. On the twenty-fifth of March, 1775, six days after the Watauga purchase, Jacob Brown, the founder of the Nollichucky settlement, who had leased from the Cherokees in 1772, likewise converted his lease into a purchase.[6]

Thus the settlers on the Watauga believed that they had at last secured a valid title to their lands.

In regard to the Watauga polity, there has been much confusion and error, and it is impossible to speak now, with absolute assurance, of certain features of it, as the articles of association have not been preserved. We know that the Association was established in 1772, that in August, 1776, the Watauga and Nollichucky settlers applied for annexation to the State of North Carolina: that the petition was granted, and that in the following year, all the North Carolina settlements west of the Alleghanies were included in a partly organized district of the State.

The opinion heretofore prevalent as to the organization of the Association, is, in one important respect, almost certainly erroneous. It is said by Roosevelt, Putnam, Phelan, and Ramsey, who, in this respect, were followed in the first edition of this book, that the

[6]Reports of the Bureau of Ethnology, volume V (1883-4), pages 146-7.

settlers, in the first instance, elected a committee of thirteen, and that these selected from their own number, a court or committee of five, to which was intrusted the actual conduct of affairs.[7]

Haywood, who does not seem to have been impressed so much as later historians, by the unique quality, and the historic importance of the Association, speaks of it, unfortunately, in the most general terms. It remained for a younger and exceptionally competent historian to suggest a solution of the doubts and confusion that have arisen, which has every seeming of correctness.[8]

It had been noted by earlier writers that the Cumberland and the French Broad settlers, when they organized themselves, under conditions the most similar to those of the Watauga pioneers, had only one governing body, although it is certain that the men who formed these later compacts, were familiar with the Watauga scheme. Why then should Watauga have had the Committee of Thirteen, and the Court of Five, and the other Associations only a single governing body?

A careful study of the facts, with the aid of newly discovered material, seems to compel the conclusion that in 1772 the Watauga settlers met, organized, and

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[7]Putnam's History of Middle Tennessee, page 30; Phelan's History of Tennessee, page 33; Ramsey's Annals of Tennessee, page 107; Roosevelt's Winning of the West, volume I, page 184.

[8]American Historical Magazine, volume III, page 116; article by A. V. Goodpasture.

established the Court of Five, vesting in it all the powers of the government; that this arrangement continued until the rupture between the Crown and the Colonies, and that the Committee of Thirteen was then first established by the people on the Watauga and the Nollichucky, who united in 1775, and organized themselves under the name of Washington District, upon the plan adopted by the Provincial Congress of North Carolina, and that thenceforth the Committee of Thirteen performed, for the united settlements, the duties imposed by the Congress upon the Committees of Safety, but without superseding the Court of Five.

It is, in the first place, hardly probable that the Watauga people elaborated their scheme of government so far as to provide for two such bodies as the Committee of Thirteen and the Court of Five, as this would have necessitated nice definitions of jurisdictions and powers, such as we have no reason to think were attempted. We know that the compact was written, and without its express authority the larger committee could not have imparted to the smaller the extensive powers which it certainly exercised. It is hardly conceivable that the five appointed the thirteen. Indeed, so far as any needs of the original government were concerned, there seems to have been nothing that the thirteen could have done. According to all the historians of Tennessee, the Court of Five possessed and exercised, so long as the Association remained independent, or detached, every power of administra-

tion, legislative, executive, and judicial. Naturally, then, it was difficult to account for the larger body, or to define its powers and duties as a part of the original government.

The colonial records of North Carolina disclose certain facts that strongly support the opinion here presented.

On the ninth of September, 1775, the Provincial Congress of North Carolina adopted a resolution providing for each District of the Province, of which there were then six, a Committee of Safety, to consist of a President, and twelve other members. The Committees were to meet quarterly, or as often as necessary, and were to direct the militia and other forces of the Province, and to have power to receive information, and to punish delinquents.[9]

The power to appoint the district committees was vested in the Congress, but Washington District, as the western settlements called themselves, had not yet been formed, or at least its existence had not yet been made known to the Congress. It is probable that as soon as this Act of the Congress came to the knowledge of the patriotic settlers west of the mountains, they organized themselves and prepared their petition for annexation, which was addressed to the Council of Safety, as the Congress had adjourned. The original of this petition was found, by Ramsey the historian of Tennessee, among the archives of North Carolina,

[9]Colonial Records of North Carolina, volume X, page 208.

and was endorsed, "received, August 22, 1776." The journal of the Council of Safety, of Thursday, August 22, 1776, contains the following: "The petition of the Committee of the settlements of Watauga and Holston, called by them Washington District, and of the inhabitants thereof, was read, setting forth the manner in which they first settled in that country, and the nature of their title; showing that from the commencement of the present dispute between Great Britain and the Colonies, they have adhered to the Association and resolutions of the Continental Congress and promoted as far as they could, the common cause of liberty; that the said settlements are within the bounds of this State, and praying that they may be received, and considered as a part thereof."[10]

Upon consideration of this petition the Council was pleased to approve the conduct of the Committee and people of Washington District, and to advise the freemen of the "said settlements to hold an election on the fifteenth day of October ensuing," for five delegates, who, when chosen, should attend at Halifax, where the Congress was to meet on the tenth day of November.

It seems that the election was held as recommended, as the following appears on the journal of the Congress for November 19, 1776: "Mr. Willie Jones moved that a petition laid before the Council of Safety,

[10]Colonial Records of North Carolina, volume X, page 702.

in August last, from the settlers of Watauga and the District of Washington, praying to be annexed to this State, etc., and a resolution of said Council on that petition be read. The same being read and debated, it was moved and seconded that the three persons who now attended Congress to represent the settlers in Washington District, might be permitted to subscribe the test and take their seats; it being objected to, the question was put and carried in the affirmative, 153 to 1, whereupon Mr. Charles Robeson, Mr. John Carter, and Mr. John Haile, three of the delegates from Watauga settlement and District of Washington, appeared, subscribed the test, and took their seats in Congress accordingly."[11]

From this it is to be inferred that the District was annexed as already organized, and that the existing Committee of Safety was recognized. At least, careful search has failed to discover any act of the Congress either revoking or confirming the appointment of the Committee named in the petition. In addition to the three delegates who were sworn in on the 18th of November, John Sevier and Jacob Womack had been elected, and Sevier afterwards appeared and qualified, but Womack did not attend.[12]

This was the Congress that framed the first Constitution of North Carolina.

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[11]Colonial Records of North Carolina, volume X, pages 925-6.

[12]Ramsey's Annals of Tennessee, page 139.

There is little reason to doubt, then, that the Watauga Association was originally formed by the settlers on the Watauga alone; that the people in Carter's Valley, and elsewhere north of the Holston had no part in it, and that the Brown or Nollichucky settlement, was not connected with it until about 1775. Haywood states that Brown's settlement was, in part, composed of tories, and that, on application of John Carter, a party of Virginians came down from Wolf Hills, and required the Nollichucky people to swear allegiance to the American cause. He adds: "after this, Brown's people, and those of the Watauga were considered as one united settlement and appointed their officers as belonging to the same body."[13]

It would appear thus, that it was by the policy of expansion that Brown's Settlement became a part of the Watauga Association, after the revolt of the Colonies.

The petition for annexation describes the applicants as: "The inhabitants of Washington District, including the river Watauga, Nollichucky," etc. Nothing is said of Carter's Valley or of the Holston.

Haywood says of the Watauga Association: "In 1772, the settlement on the Watauga, being without government, formed a written association and articles for their conduct. They appointed five commissioners, a majority of whom was to decide all matters of con-

[13]Haywood's History of Tennessee, page 61.

troversy, and to govern and direct for the common good in other respects."[14]

Moses Fisk, who wrote in 1816, and who personally knew many of the Tennessee pioneers, says: "A code of laws was drawn up, to be signed by every individual. If any one should refuse, he was to be debarred from its benefits. But there was no recusant. * * * Magistrates were elected under the denomination of Trustees, by whom all controversies were to be decided conformably to the written code. There was much energy in the system, and it proved very satisfactory."[15]

Bancroft, writing of Watauga, says, "For government, its members, in 1772, came together, as brothers, in convention, and founded a republic by written association; appointed their own magistrates; Robertson among the first; framed laws for their present occasions, and set the people of America the example of erecting themselves into a state independent of the authority of the British King."[16]

Ramsey declares that, "the settlers, in convention assembled, elected as commissioners thirteen citizens." He then gives the names of the thirteen, as they appear in the petition for annexation, and states that "the Court," was composed of five of these, to wit, John Carter, Charles Robertson, James Robertson, Zach

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[14]Haywood's History of Tennessee, page 54.
[15]American Historical Magazine, volume II, page 21.
[16]Bancroft's History of the United States, edition of 1891, volume III, page 403.

Isbell, and John Sevier, and that William Tatham was clerk.[17]

Haywood says in another brief notice that there was a sheriff as well as a clerk, and that the Committee, as he here calls it, had stated and regular times for holding its sessions, and took the laws of Virginia for its guide.[18]

The petition for annexation attests the general correctness of the statements of Haywood and Fiske, as the following quotation from it will show: "finding ourselves on the frontiers, and being apprehensive that for the want of a proper legislature, we might become a shelter for such as endeavored to defraud their creditors; considering also the necessity of recording deeds, wills, and doing other public business, we, by consent of the people, formed a court for the purposes above mentioned, taking (by the desire of our constituents), the Virginia laws for our guide, so near as the situation of affairs would admit. This was intended for ourselves, and was done by the consent of every individual, but wherever we had to deal with people out of our district, we have ruled them to bail, to abide by our determinations, (which was in fact leaving the matter to reference), otherwise we dismissed their suit, lest we should in any way intrude on the legislature of the colonies. In short we have endeavored so strictly to do justice, that we have ad-

[17]Ramsey's Annals of Tennessee, page 107.
[18]Haywood's History of Tennessee, page 59.

mitted common proof against ourselves, on accounts, etc., from the Colonies without pretending a right to require the Colony seal."[19]

The petition further alleges that one of the principal reasons for the application for annexation was the want of proper authority to try felons, such as murderers, horse-thieves and robbers.

There is but little more that is authoritative in regard to the Watauga polity. The Articles of Association, and the Court records, which undoubtedly existed, cannot be found, and it has been intimated that the minutes of the Court were destroyed purposely, because that tribunal, though lacking authority, had assumed, sometimes, the power to try felons, and in so doing had evinced a high sense of the merit of summary justice.

Let us inquire who the Watauga settlers were, what motives prompted them to establish a government of their own, and in what manner the government was conducted.

We have seen that the Association preferred the laws of Virginia to those of North Carolina, and we know that it was by reason of the common understanding of the treaty of 1770, that some of them settled on lands supposed to have been ceded to Virginia by that treaty.

The discovery of the fact that they were in North Carolina, and not in Virginia, caused much dissatis-

[19]Ramsey's Annals of Tennessee, page 136.

faction among them. They were separated from the settled regions of the parent Colony by almost impassable ranges of mountains, and even if communication had been easier, they were not regarded with favor by North Carolina, and moreover the affairs of that Province were in a condition so disordered and its administration was so hampered, that neither protection nor aid could have been expected on the Watauga, even if relations had been cordial. The Indians were constantly threatening, and many lawless characters, needy adventurers, and "persons evading the demands of justice," had come with the first wave of immigration. When, some years later, the settlers in Illinois found themselves in a similar situation, they sent a petition to Congress for a governor and soldiers. As Roosevelt aptly says, they wished for a master. But in Watauga, the people were Saxon, English Saxon, and Scotch-Irish Saxon for the Scotch-Irishman was of the same race as the Englishman, and for centuries had been trained in the same political school. The Watauga settlers quickly manifested the race instinct for self government along with a bold self reliance. They did not fretfully invoke the aid of North Carolina, and while awaiting a response, tamely submit to the evils of which they complained, but being of a free race, state making, and apt to organize, they constructed a government of their own. This extemporary State was rough-built, but it answered the purpose for which it was intended.

Every thing about the Watauga government was unmistakably English, and it is hardly too much to say that in this little back-woods settlement Anglo-Saxon political principles had for the first time full scope. The government derived its powers from the unanimous consent of the governed, every freeman having signed the compact, and thus there was a true democracy, without class distinctions, and with unlimited religious liberty. There were no lawyers or statesmen, but there was a love of liberty and law, and abundant common sense, boldly and effectively applied to conditions demanding prompt action. As a rule the people were of limited education, nearly all were poor, and rough in life and manners, but they had inherited the traditions and the instincts of the most liberty loving of races. They were prompted by necessity, and not by the wish to stand alone, and while they desired the protection of the laws and of the military strength of Virginia, no doubt they would have submitted promptly to the authority of North Carolina, if that State had shown a disposition to claim them, or to afford them protection. It is suggested with the greatest deference to Mr. Bancroft, that the language of the royal Governor of Virginia, which he adopts in part, in the sentence quoted above, does not accurately describe the conduct of the Watauga settlers. In a sense they did "set to the people of America the example of erecting themselves into a state independent of the author-

ity of the British King," but they were not rebels, and did not disclaim allegiance to the Crown. They had come to Watauga expecting and desiring to be citizens of the royal Province of Virginia, and to obey its laws. When it was discovered that they were in the Indian country, to use their own language, they "applied to the Cherokee Indians, and leased the land for a period of ten years." It is true that the proclamation of 1763 forbade the provincial Governors to grant lands west of the mountains, or of the heads of the streams flowing into the Atlantic, and enjoined private persons from purchasing lands from the Indians, and it may be also that this lease from the Cherokees was technically invalid, but it is evident that the settlers were endeavoring to keep within the law, hoping, that eventually they might be able to perfect their title. When they made their purchase three years later the Revolution was in sight, and they had before them the example of Richard Henderson, a learned lawyer, and lately a judge of the royal Province of North Carolina.

Unquestionably the independence reprehended by the Governor of Virginia was the establishment of the Association, but the real offense, if any existed, was in continuing to occupy the Indian lands, and this certainly was palliated, if not cured, by the contract with the owners. The Association was merely a result of the determination to remain on the land under existing conditions. The completeness of their isolation

forced the settlers to form a union for self protection, and in creating and conducting this, they displayed, invariably, the highest regard for the laws and rights of the royal Provinces.

The Governor of Virginia was the worst possible judge of the conduct and purposes of the Watauga Association, and the most likely to see disloyalty and treason where none existed. It is clear that when the Association was formed, there was no purpose to separate from England, and that the subject was not even considered. The action was "independent of the authority of the British King," in that it was taken without the approval or knowledge of the royal or provincial authorities, but the settlers were probably as loyal subjects of the Crown as could have been found in the Colonies at that time. If, in 1774, they disregarded Governor Martin's proclamation, it must be remembered that during the two years that had elapsed since the establishment of the Association, the differences between the Crown and the Colonies had steadily increased, and soon after Martin's proclamation reached Watauga, the entire Province of North Carolina was in a state of insurrection.

Moses Fiske states the fact aptly when he describes the Watauga Association as a "little republic which originated not in opposition, but convenience." [20]

That by the year 1772, the sentiment of loyalty to England had become impaired in all the Colonies by

[20] American Historical Magazine, volume II, page 22.

distance, by the conditions of life, especially in the remoter west, and by the unjust policy of the Crown, may be admitted. It is undeniable also, that the Scotch-Irish, who formed the dominant element of the population of Watauga were exceptionally independent and democratic, and that some of them had participated actively in the Tryon rebellion in North Carolina. Nevertheless, it seems certain that the prime, indeed the sole motive, of the founders of the Association was not opposition to any authority whatever, but a desire to create an authority where none existed, and where one was imperatively demanded. Phelan intimates that the people of Watauga looked forward to founding an independent State, but certainly this was not the motive for establishing the Association.

The episode loses nothing in significance or importance by this construction, the fact remaining that the people had become self reliant, and conscious of their ability to protect and to govern themselves.

It will be seen by reading the petition for annexation that the Association did not claim the right to exercise all the functions of a government. It did not feel authorized to deal with felons, and the petition ingenuously expressed regret that "some" of these had therefore escaped. Every sovereign State applies and executes its police laws where aliens are concerned, in all respects as where its own citizens are affected, but the Watauga Association resorted to

arbitration where nonresidents were involved, and it is evident from this, and from other facts that might be mentioned, that the people regarded their Association as being the only thing that it really could have been, that is, a temporary arrangement by which they agreed that a designated body of men should exercise such powers of government as were necessary for the common good. So far as the associates themselves were concerned, it was perhaps, in effect, a fully appointed and empowered government, but as to others, it was not.

The Articles of Association provided either expressly, or by adopting the laws of Virginia, for the recording of deeds and wills, and for the transaction of other "public business." In addition to this, the Association first leased, and then purchased lands, in its corporate capacity, and entered into treaties with the Indians. These things indicate the existence of a government claiming, and exercising nearly all the more important attributes of sovereignty, while the anxiety of the Association lest it "should in any way intrude on the legislature of the Colonies," and its acknowledgment of a "want of proper authority to try and punish felons," show that it did not regard itself as possessing, rightfully, all the powers of an independent state.

The form of organization was that of a Virginia County, not of a State, or Province. It had a Sheriff but no Governor, a Court but no Legislature, although

the Court had the power to make laws, a power which, to a limited extent, belonged to the county courts of Virginia.

It is reasonably certain that after the annexation to North Carolina, in 1776, no changes were made in the government of Washington District, as it was now called, until the spring of 1777. During the five years existence of the Watauga Association the settlements increased and flourished, and at the outbreak of the Revolution, as we have seen, were able to enlist a company of "fine riflemen."

There is every reason to believe that the government, while simple and crude in organization and equipment, and informal in method, was both just and efficient. Its official head, for a part of the time at least, was John Carter, who was probably of the Carter family which had so prominent a part in the early history of Virginia. It is impossible to say certainly when he went to Watauga, but Ramsey says that it was in 1771 or 1772. He did not live to take part in founding and building the State of Tennessee.

James Robertson was the first of the leaders of the Association to settle on the Watauga, and probably he was the most useful as well as the most influential member of the community.

John Sevier was one of the most brilliant figures in early western history, a gallant soldier, a skillful commander, a genial, kindly, and attractive man, and a statesman of constructive ability. He alone of all the

pioneer leaders of Tennessee seems to have been able to foresee the coming greatness of the State. He had faith in her destiny from the first, and his policy wisely provided for the future.

Next to these three in importance was Charles Robertson, who was highly esteemed by his associates, as appears from the fact that he was the trustee in whom title to the lands purchased from the Cherokees was vested.

The pioneer history of the west does not contain the names of men of greater worth or ability than James Robertson and John Sevier.

Watauga may have had but little influence on the course of history beyond the borders of Tennessee, but it has a great and general interest and importance as the first concrete manifestation of the distinctively American spirit of independence.

The Watauga settlers were, with a few exceptions, plain people, without any claim to social position, possessing the rougher virtues and not a few of the finer ones, but having also the faults that were begotten, almost invariably, by the unrestrained life of the frontier, its hard and unrefining conditions and its constant scenes of violence. The generation which succeeded them retained their characteristics, and, on account of the isolation of Eastern Tennessee, social and general conditions in that section of the State were but little changed until about the time of the civil war, and many living men know the Watauga

pioneers through their immediate descendants. We know that as a rule they were honest and worthy; that a majority of the better class were Presbyterians, until the advent of the aggressive pioneer, Baptist and Methodist Churches; that the Scotch-Irish predominated; that the moral tone of the community was sound despite the unavoidable pauper and criminal immigration; and that political principles were of the soundest Anglo-Saxon stock.

The first settlers west of the Cumberland Mountains, were, generally, of the same race and quality. West of the mountains, however, the proportion of the immigrants from North Carolina was greater than in the east, because of the payment of the revolutionary soldiers of the mother state, by grants of land in that division.

It will be found, however, that throughout the State, except perhaps in the larger cities, the Scotch-Irish to this day outnumber by far the representatives of any other race. If the western divisions are right in claiming the more opulent ancestry, it is nevertheless true that from the first Tennessee has been, probably, the least aristocratic and the most democratic state in the Union. It is very justly remarked by Mr. Roosevelt that while in Kentucky and other Southern States, the control of affairs passed quickly to a wealthier class which followed the first immigration; in Tennessee it was not so. Here the intensely democratic spirit displayed by the first settlers still

exists and is dominant. Even the institution of slavery could not overcome it. Nowhere is the equality of men more positively or more persistently asserted. The fixed opinion of the genuine Tennessean is that he has no superior, if indeed he has any equal.

The Calvinistic theology of the early settlers inculcated democracy, and personal independence, while racial instincts and traditions, and the necessarily strenuous life of the frontier begat combativeness. As in all Calvinistic communities Old Testament influences were strong, and in church and state the good fighter was the public favorite. Andrew Jackson is the best representative of the class of public men developed in the early history of the State; men of indomitable courage, genuine and unselfish patriotism and strong prejudices; unfailingly true to friends, and relentless toward enemies.

The people were industrious, and, from necessity, intensely economical. Their lives were hard, and narrow, but hospitality and neighborliness were among the virtues most esteemed. Luxury and wealth were disapproved to such an extent that demagogy was unconsciously encouraged. Each neighborhood was its own world, consumed its own products, and supplied its own necessities. The houses were rough, and at first, were built of logs, puncheon floored and meagerly furnished. The people were nearly all theologians and politicians, and Eastern Tennessee was long noted for bitter political strifes, and, not less

bitter religious controversies, these last giving rise frequently to public debates, in which the representatives of the different sects were supported and applauded by immense audiences. These conditions fostered the natural tendencies of the people toward democracy and personal independence, and active interest in public affairs, and when the time came for the full assertion of the rights of the common people, Tennessee was at the front of the movement, and furnished in Andrew Jackson its undisputed leader. Such were the characteristics of the pioneers of Tennessee and of the generation that succeeded them.

The fact that such an organization as the Watauga Association existed for five years, and was acceptable to the people, is convincing proof of the wisdom and worth of the men who founded and administered it.

When, in 1777, North Carolina created Washington County there was no disturbance, and almost no change in public affairs or administration. In most instances the Watauga officers were appointed to corresponding places in the State, and matters went on as before.

The law was administered with the same directness, informality and efficiency, and the connection with the State was little more than nominal. As late as 1784 the Watauga country was not fully organized as a part of North Carolina, and at no time were relations satisfactorily adjusted.

The Watauga Association has been made prominent

by recent writers and some, having a just pride in it, have made claims for it, that, in certain respects, are excessive.

It has been called the "first free and independent government in America," and in a sense this is true. It was the first of the series of temporary, self-dependent, and thoroughly American governments established on our western frontier in the revolutionary period. The Tennessee historians, as a rule, are content to say that its Compact was the first written Constitution west of the Alleghanies, and Roosevelt concurs in this and adds that it was the first free and independent government established on this continent by men of American birth.

John Fiske, speaking of the Fundamental Orders of Connecticut, the best known and the most radical of the early New England attempts at Constitution making, says: "it was the first written Constitution, known to history, that created a government, and it made the beginning of American democracy."[21]

It is to be remarked, however, that the Connecticut settlers of 1639 were Englishmen, while the Watauga pioneers were Americans. This detracts nothing of course from the credit due the makers the Fundamental Orders. That admirable instrument, while it did not make suffrage universal, and did not allow complete religious liberty, contained no reference to the King, and upon its face, was as much the organic

[21]John Fiske's "Beginnings of New England," page 127.

law of an independent people as was the Watauga compact. Naturally the Watauga Americans of 1772 were of a more advanced and liberal democracy than the English colonists of 1639, and theirs was purely a political, and in no sense a religious movement. They established no religious test, and, apparently, allowed all men equal rights upon the simple condition of signing the compact.

In 1772 this country was almost ready for revolution. The growth of the spirit of independence had been demonstrated by the persistent assertion of the right of self taxation and by such occurrences as the Tryon rebellion in North Carolina. Owing, as it appears, to purely fortuitous circumstances, the Watauga settlers were the first to embody the principles of American democracy in actual institutions. It may be claimed, justly, that they were the best prepared for this step as well as compelled to it by their conditions, but however this may be, they were the first native Americans to establish a pure democracy.

They did not consciously imitate any one, but simply obeyed the dictates of their own good sense and brave hearts, setting an example which has had the most salutary influence upon succeeding generations, and affording good grounds for the pride with which they are regarded by the people of Tennessee.

CHAPTER II.

CUMBERLAND.

1780-1783.

"Like almost all those in America who have ascended to eminent celebrity, he had not a noble lineage to boast of, nor the escutcheoned armorials of a splendid ancestry. but he had what was far more valuable, a sound mind, a healthy constitution, a robust frame, a love of virtue, an intrepid soul, and an emulous desire for honest fame." These are the flowing words with which John Haywood, the first historian of Tennessee, a just man and tenacious of his rhetoric, describes James Robertson, the pioneer leader of Watauga, and of Cumberland.

Much has been written in praise of Robertson, but not more than he deserves. His origin was obscure though not unworthy. His early life was one of constant hardships and privations, and his mature years were full of dangers and the most trying responsibilities. He grew up illiterate, but acquired as a man, a little of the education which others receive in childhood. He was a plain and simple man, but his mind was not only sound, but also alert and vigorous. As a hunter, scout, and Indian fighter, he was not inferior

to Boone, whom he surpassed so far in intelligence, in influence, and in actual public service, as to belong to an entirely different class. He was one of the founders of the Watauga settlement, its staunchest defender, and, on one memorable occasion, indisputably its preserver. His name is most intimately connected however, with the history of Middle Tennessee, because he was in a very special sense the founder of the Cumberland settlement, its unfailing reliance in the trying time of its infancy, and its foremost citizen for many years. He was as kindly and unselfish as he was brave and resolute, and to all these admirable qualities must be added exceptional abilities, as a leader of men and as a builder of institutions. Though like others, he had his limitations and imperfections, history and tradition alike fail to attribute to him any unworthy or unmanly act. He had none of Sevier's brilliancy of mind or conduct, but little of his suavity and gift of personal attraction, was distinctly inferior to him in constructive capacity, but surpassed him in solidity of character, in firmness, and in soundness of judgment. He was a wise, brave, persistent Scotch Irishman, capable of self sacrifice, and born to public service, and was, in practical affairs, the safest and surest of our pioneer leaders.

The settlements on the Cumberland must be connected with the Transylvania purchase, as one of the tracts of land claimed by Henderson & Company, was bounded by the Cumberland River.

How intimately Robertson was connected with Henderson, we do not know, but the hand of the great promoter is to be seen in everything in connection with the settlement and the organization at Nashboro. Robertson had been almost ten years at Watauga, when, probably Henderson's eloquence, and it may be, more substantial incitements, gave new energy to the westward impulse which had brought him over the mountains. Whatever the immediate cause may have been, we find him taking long and dangerous journeys into the wilderness, which extended unbroken, from the Holston to the Mississippi. There were others not less daring than he, and these returning joined him in spreading the most alluring accounts of the fertility and beauty of the rolling plains of Middle Tennessee, as it is now called. If Henderson and his associates were instrumental in this, the first results were most satisfactory to them. Through Cumberland Gap, or down the long and winding course of the Tennessee, and up the Ohio and Cumberland, eager Companies of adventurers and home-seekers, starting mainly from Watauga, found their arduous way to the new land of plenty. Another Scotch-Irish settlement was planted upon the site of the future capital of Tennessee under the leadership of Robertson. The station at Nashboro, now Nashville, was established early in the year 1779, and on the twenty-fourth of April, 1780, arrived the devoted party that had made with Donelson the epic voyage from Watauga, an under-

taking as daring, as heroic, and as full of adventure, privation and suffering, as any recorded in pioneer history.

On the first of May, 1780, the Compact of government was drawn up, and on the thirteenth of that month important additions were made. There were at this time eight stations each of which was represented in the Court or Committee which was now created, the representation being apportioned according to population, as follows: Nashboro 3; Gaspers 2; Bledsoe's 1; Asher's 1; Stone's River 1; Freeland's 1; Eaton's 2; Fort Union 1. The delegates as a body were designated, usually, as "Notables" but technically as "General Arbitrators, Judges or Triers," and their powers and duties may be defined as follows: "Said persons, or a majority of them, after being bound by the solemnity of an oath, to do equal and impartial justice between all contending parties, etc., shall be empowered and competent to settle all controversies relative to locations and improvements of lands; all other matters and questions of dispute among the settlers, protecting the reasonable claims of those who may have returned for their families; providing implements of husbandry and food for such as might arrive without such necessaries; making especial provision for widows and orphans, whose husbands or fathers may die or be killed by the savages; guaranteeing equal rights, mutual protection, and impartial justice; pledging themselves most

solemnly and sacredly to promote the peace, the happiness and well being of the community, to suppress vice, and punish crime."[1]

The Compact which was discovered and preserved by Putnam, the historian of Middle Tennessee, is a document of excellent literary quality, and shows a clear perception of the essential principles of popular government, and a liberal and enlightened public spirit. Its framers gave careful attention to the subject of land locations and improvements, as a result, no doubt, of ample and painful experience, and as a necessary precaution in dealing with the Transylvania Company. Payments for the lands, all of which the Company undertook to convey, were made contingent upon the legal recognition of the Transylvania purchase. The regulations affecting the settlers in land transactions among themselves were eminently wise and just, as the quotation above will show. Not the least commendable was a provision authorizing males sixteen years of age to hold land in consideration of their liability to military service.

Subsequent sections of the Compact provide adequately for the administration of the departments and affairs of an orderly government, but there is an express recognition of the want of sovereign authority. The Judges, or a majority of them, were made competent to transact all public business. They were elected by the votes of all free men over the age of

[1]Putnam's History of Middle Tennessee, page 90.

twenty-one years, at least it is inferred that this was the age prescribed, an unfortunate mutilation of the only copy of the Compact that has been preserved, making it impossible to speak with certainty on this point.

Vacancies in the Committee were filled by the electors of the stations losing representatives, and the highest regard for popular rights was shown in the following provision: "That as often as the people are dissatisfied with the doings of the 'Judges or Triers,' so to be chosen, they may call a new election at any of the stations, and elect others in their stead." It will hardly be denied that this was essentially a democratic Constitution.

The judges were declared to be a proper "Court of Jurisdiction," for the recovery of any debt or damages, provided the cause of action had arisen among the settlers at a time when they were beyond the limits of established government. Cases involving $100 or less were tried before three of the Judges whose decision was final. If the amount involved was larger, it seems that the three Judges might still hear the cause, but an appeal would lie to the whole Court. Upon the hearing of these appeals, the Judges who had officiated as a lower Court, were excluded, and the remaining members constituted a full bench, the concurrence of seven being necessary to a decision. The costs were taxed according to the discretion of the Court, and the judgments were executed by persons designated by it.

It is not to be doubted that Henderson designed the Court system and its regulations, following, apparently, the judicial establishment of the Province, and not of the State of North Carolina.

The Judges had general criminal jurisdiction, but were forbidden to proceed with execution "so far as to affect life or member, and in case any shall be brought before them, whose crime is or shall be dangerous to the State, or for which the benefit of clergy is taken away by law;" then the offender was to be sent under guard to the place where the offense had been committed, or to a place where a legal trial could be had.

The Compact was signed by Henderson, not as a proprietary, as in Transylvania, but as a private citizen, and also as the agent of his Company. His name is first in the list of signers, and the next is that of Nathaniel Hart, another of the Transylvania proprietors. Among the other signatures are those of Nathaniel and Pleasant Henderson, brothers of Richard Henderson. The contract, as to the lands, was with Richard Henderson, and it is expressly recited that "the said Richard Henderson, on his part does hereby agree," etc. The price of lands fixed in the Compact was twenty-six pounds, thirteen shillings, and four pence, current money, for one hundred acres, but Putnam declares that the sales were made at ten dollars for one thousand acres.[2]

[2]Putnam's History of Middle Tennessee, page 103.

The Articles conclude with the declaration that the signers do not desire to be exempt from their "ratable share of the public expenses of the war, nor from any other contingent charges of government," and with a prayer addressed to the Legislature of North Carolina, for immediate aid and protection, for the establishment of a county to include the settlements, and for the appointment of officers for the discharge of public duties.

It is hardly probable that Henderson cordially approved these patriotic utterances, as he had taken no part in the Revolution, but after the downfall of the royal government in North Carolina, had devoted his considerable abilities with much energy and enterprise to the betterment of his personal fortunes. He had the gifts of a promoter in an eminent degree, and devised and executed the plan to establish the Republic of Transylvania, the ghost of the old proprietary colony. In the Compact of government adopted in Kentucky in 1775, he and his associates described themselves as "Proprietors of the Colony of Transylvania," and further pursuing the proprietary plan, reserved to themselves the power to call the delegates of the people together in an emergency, and the right to sit as one of the three branches of the Legislature which, in effect, gave them a veto.

The court system of provincial North Carolina, was copied in Transylvania, and the power to appoint

nearly all the civil and military officers was reserved to the proprietors.[3]

That Henderson believed it possible to reproduce in Kentucky after the Revolution had begun, the obsolete and undemocratic proprietary plan of government is not creditable to his intelligence, and shows that, up to that time, he had failed to apprehend the spirit and tendency of the great events that were happening.

Every condition was against him. One of the last acts of Martin, the deposed royal Governor of North Carolina, had been to denounce the Transylvania Company, whose purchase was clearly invalid under the proclamation of 1763, and the statutes of North Carolina.

The State governments, when established, refused, properly, to recognize the right of individuals to treat with the Indians, and as a final blow, Congress denied the application of Transylvania for admission into the Confederation. It is proper to add that after awhile the States of Virginia and North Carolina, not very logically, enacted that while Henderson's purchase could not vest title to the lands in his Company, it had extinguished the Indian title, and therefore the Transylvania proprietors received two hundred thousand acres in Kentucky, by grant of the legislature of Vir-

[3]Hall's Sketches of the West, volume I, pages 271-3; Colonial Records of North Carolina, volume IX, pages 1276-1278.

ginia, and 190,000 acres in East Tennessee, by grant of the legislature of North Carolina, as compensation for the risks and expenses of the Company.[4]

In 1780, Henderson still hoped to establish the title of the Company, but he no longer cherished the delusion that he could revive the old proprietary institutions, in whole or in part. He signed the Cumberland Compact therefore, in the capacity of agent of the Company, and as a citizen, having no rights that were not common to all others. Whatever he may have wished, he could not have believed it to be possible to establish among the staunch patriots of Cumberland, any but a genuinely democratic government. Possibly he was the draughtsman of the whole Compact, but not the author of its purely democratic and ardently patriotic clauses.

We may assume with confidence that Robertson, the most thorough going of democrats, cast the weight of his paramount influence in favor of a temporary government, like that under which he had lived for five years on the Watauga. In accord with him no doubt were his three associates, Lucas, Tatham, and Isbell, who had been men of prominence at Watauga.[5]

It seems that Watauga was purely democratic, selecting its Court at a meeting of all the signers of the agreement, whereas, Cumberland while equally

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[4]Acts of North Carolina, 1783, chapter XXXVIII; Ramsey's Annals of Tennessee, page 204.

[5]Putnam's History of Middle Tennessee, page 26.

democratic in its first step, adopted the representative method in selecting its Court. The Court was appointed by the Convention at Watauga, and elected by the voters of the several stations in Cumberland, the members representing the stations, primarily, and not the entire settlement, and being removable for cause by their own particular constituents.

In the details of organization there were such differences between the Watauga and Cumberland Associations as resulted from the fact that Watauga adopted the laws of Virginia, and Cumberland those of North Carolina.

The Cumberland Compact contains an express acknowledgment of the sovereignty of North Carolina, and a declaration of the causes of its establishment, in the following language:

"As this settlement is in its infancy, unknown to government, and not included within any county within North Carolina, the State to which it belongs, so as to derive the advantages of those wholesome and salutary laws, for the benefit and protection of its citizens, we find ourselves constrained from necessity to adopt this temporary method of restraining the licentious, and supplying by unanimous consent, the blessings flowing from a just and equitable government."[6]

These words so accurately represent the conditions

[6]Putnam's History of Middle Tennessee, page 97.

and the purposes of the Watauga settlers that one is ready to believe that they were borrowed from the older Compact.

Certain points of difference in the conditions and conduct of the two settlements should be noticed. The Watauga people were at first settlers or squatters, on lands believed to belong to the Province of Virginia, and afterwards in their corporate capacity, lessees, and, finally, purchasers of the Indian lands, with title lodged in a trustee of their own selection, with power to convey to individual purchasers; whereas, the lands on the Cumberland were treated as belonging to Henderson & Company, who conveyed them to individuals, and not to the Committee. It is evident that Henderson construed his deeds as covering all the lands watered by the tributaries of the Cumberland, as otherwise, Nashville, which is on the south bank of that river, would not have been within their boundaries.

The sentiments of the Cumberland settlers toward the State of North Carolina were distinctly more friendly than those of the Watauga people, as is apparent in many ways, and especially in the fact that Cumberland had no part in establishing or maintaining the State of Franklin, but throughout the existence of that brief Republic, obeyed the laws of the parent State, although the very small community of Clarksville, seems to have manifested something of the separatist feeling, for in 1785, and presum-

ably as a consequence of the North Carolina cession of 1784, the people of Clarksville held a "Convention," appointed a "Court," and asserted the right to make laws not repugnant to those of Congress; and this most minute of the Tennessee Republics, maintained its position for something like two years.[7]

There is nothing to be said of the social and political conditions of Cumberland, that has not been said, already, of Watauga. We find in the two communities the same race and class of men, the same leader, the same necessities and purposes, arising from similar environments; and the same honest, direct, fair and efficient administration of a temporary government, which was judiciously framed, and was indispensable and invaluable. It is not quite clear that the Cumberland government had either the vigor or the continuity of the Watauga Association. Moses Fiske, comparing it with the Watauga Association, says, "It proved equally salutary, and continued until their organization into a county."[8]

But the records as reprinted in Putnam's History of Middle Tennessee, contain the following under date of January 7, 1783:

"It appears highly necessary for the common weal of the whole, the securing of peace, the performance of contract between man and man, together with the suppression of vice, again to revive our former man-

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[7]American Historical Review, volume I, page 78.
[8]American Historical Magazine, volume II, page 26.

ner of proceedings pursuant to the plan agreed upon at our first settling here."[9]

It further appears that, shortly before the date of this record, an election of Judges had been ordered, and the following elected: Thomas Molloy, James Robertson, George Freeland, Isaac Lindsay, David Rounsevall, Heydon Wells, James Maulding, Ebenezer Titus, Samuel Barton and Andrew Ewin.

No record of a meeting of the Committee at any earlier date has been found, but it is well established that an organization was effected in 1780, which it seems, continued until unavoidably abandoned on account of hostilities with the Indians, so incessant and harassing that civil government became impossible.

In this bitter and cruel struggle the settlers displayed a fortitude and courage never surpassed.

With the return of peace, their love of law and order reasserted itself, and their home-made government was revived, and satisfactorily operated, until North Carolina, granting their prayer, took them under its wings, and Cumberland passed honorably into history.

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[9]Putnam's History of Middle Tennessee, pages 169-170.

CHAPTER III.

FRANKLIN.

1784-1788.

On the second day of June, 1784, the Legislature of North Carolina ceded to the United States all the territory of that State, west of the Alleghany mountains, provided Congress should accept the same within two years.[1]

By a later Act, passed at the same session, it was declared: "That the sovereignty and jurisdiction of this State in and over the territory aforesaid, and all and every the inhabitants thereof, shall be and remain the same in all respects, until the United States in Congress shall accept the cession, as if the act aforesaid had never passed."[2]

The last Act also discontinued the land office for the ceded territory, and invalidated all entries made therein after the 25th of May, 1784, except certain ones provided for in pursuance of the State's policy of allotting lands to Continental soldiers, and to its agents and surveyors in making the allotments.

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[1]Acts of North Carolina, 1784, April Session, chapter II.
[2]Acts of North Carolina, 1784, April Session, chapter XII.

The territory thus ceded was the present State of Tennessee, in which there had been organized at this time the counties of Washington, Greene and Sullivan in East Tennessee, and Davidson in Middle Tennessee.

Soon after the passage of the cession Act, the people of the East Tennessee counties resolved to establish a government of their own, and elected as a committee for each county, two representatives from each captain's company therein. These representatives decided that there should be a Convention of deputies from all the counties, for the purpose of taking such action as the circumstances might require. Such a Convention met at Jonesboro, in Washington County, on the 23rd day of August, 1784. It was composed of thirty or more thoroughly representative and capable men, including John Sevier, the Reverend Samuel Houston, the Reverend Samuel Doak, Landon Carter, William Cocke, Stockley Donelson, Daniel Kennedy, Alexander Outlaw, Joseph Gist, Samuel Weir and David Campbell. John Sevier was elected President, and Landon Carter, Clerk, and a committee of which William Cocke was Chairman, having been appointed to consider the state of public affairs, reported that it was expedient for the Counties of Washington, Sullivan and Greene to combine in order to support the laws of North Carolina in so far as they were not "incompatible with the modes and forms of laying off a new State." The Committee was further of

opinion that the right of the Convention to petition Congress to accept the cession was undeniable, and that it was just for that body to countenance the formation of a separate government, either temporary or permanent, "agreeably to a resolve of Congress." [3]

Thereupon, a temporary form of government was adopted, a second Convention was called to meet at Jonesboro, September 16, 1784, and the Convention adjourned after pledging a "reasonable support" to a proper person to "negotiate its business in Congress." [4]

The second Convention did not meet on the 16th of September, but was delayed until November, when it adjourned without action.[5]

During its October session, 1784, the Legislature of North Carolina repealed the cession Act.[6]

The justice of the discontents of the Tennessee counties, because of the failure of the State to grant them a complete judicial and military organization, was recognized, and two important conciliatory measures were adopted by North Carolina as sequences of this repeal. The judicial district of Morgan which then included, among others, the Counties

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[3]Haywood's History of Tennessee, pages 150-151.

[4]Haywood's History of Tennessee, pages 152-153; Ramsey's Annals of Tennessee, page 287.

[5]Ramsey's Annals of Tennessee, page 290; Haywood's History of Tennessee, page 153.

[6]Acts of North Carolina, 1784, October Session, chapter XVI.

of Washington, Sullivan, Greene and Davidson, was divided and these four counties were "declared to be a distinct and separate district by the name of Washington." [7]

The militia of the new District was to be organized with John Sevier as Brigadier General.

When information of these proceedings was received, Sevier said in a public speech at Jonesboro, when the citizens were assembled to vote for delegates to another convention: "The grievances which the people complained of are redressed and my recommendation to them is that they proceed no further in their design to separate from North Carolina." [8]

It seems however, that the eloquence of General William Cocke, an ardent advocate of separation, and other influences, caused him to decline the appointment and to adhere to the Franklin movement. The Convention met again at Jonesboro, December 14, 1784, Sevier being a member and president, and agreed upon a temporary Constitution, subject to the approval of the people and to the action of a final Convention which was to meet within a year but not till after six months. The instrument thus submitted by the Convention to the people was prefaced by a statement of grievances concluding with a declaration of independence. There is the usual bill of rights and

[7] Acts of North Carolina, 1784, October Session, chapter XXVIII.

[8] Haywood's History of Tennessee, page 154.

the body of the instrument differs hardly at all, in essentials, from the North Carolina Constitution.[9]

In the month of November, 1785, the Legislature of North Carolina, passed the first of a series of acts of oblivion, extending pardon to all participants in the Franklin movement who should resume allegiance to the State.[10]

Nevertheless, deputies were elected, representing the counties at large, and not the captain's companies, who met at Greeneville, November 14, 1785, and began their work by appointing a committee to propose a form of government. Thereupon ensued the most interesting episode in the history of early western State making. The committee agreed to make the Constitution of North Carolina the basis of its work, and then proceeded to amend that instrument very elaborately and experimentally. The resultant instrument having been presented to the Convention, was, in the language of its friends, "rejected in the lump," and the Constitution of North Carolina, with very few changes, was adopted.[11]

The rejected Constitution gave the name of the State as "Frankland," but this was repudiated also, and the name Franklin adopted.[12]

[9]For copy of this Constitution see Charlotte, North Carolina, *Observer*, September 25, 1904.

[10]Acts of North Carolina, 1785, November Session, chapter XLVI.

[11]American Historical Magazine, volume I, page 51; Haywood's History of Tennessee, page 170; Ramsey's Annals of Tennessee, page 324.

[12]Ramsey's Annals of Tennessee, page 324.

Mr. Houston seems to have been the proponent of most of the new features of the unsuccessful Constitution, as he was also their most strenuous and persistent advocate. According to Ramsey, he had prepared, with the assistance of certain "judicious friends," a Declaration of Rights and a Constitution which must have been, substantially, the instrument that the Convention rejected. The influence and activity of the clergy of Franklin are shown by the fact that Mr. Houston, having thus earnestly interested himself in Constitution making, found his most aggressive opponent in the Reverend Hezekiah Balch, another Presbyterian minister, who, without being a member of the Convention, was allowed by that body to make an address in opposition to the proposed Constitution. The final action of the Convention gave great offence to Mr. Houston, who in the following year printed and circulated a pamphlet containing his Constitution and a vindication of it.[13]

His dissatisfaction was shared in less degree, by eighteen other members of the Convention, nearly half the body, who united with him in his written dissent.[14]

And while this Constitution was rejected, it is a document of great historic value and interest, because it did thus represent the opinions and wishes of so large a part of the Convention. The Watauga

[13]American Historical Magazine, volume I, page 50.
[14]American Historical Magazine, volume I, page 50.

Articles and the Cumberland Compact were not meant to be permanent. Their makers had neither time nor tolerance for theories, and made no attempt to elaborate them, but were content with a rude but strong framework of elementary principles. In 1785, however, conditions had changed. The population west of the mountains had increased to about 25,000, four-fifths, probably, being in the Franklin counties. The people were no longer in constant apprehension of the Indians, and had both the time and the inclination to consider their public affairs, and their purpose was to establish a permanent government. The preachers and the lawyers had begun to make their impress upon the community, and the constitution makers were not content merely to announce general principles, but naturally desired to formulate a detailed and completed scheme of government.

Mr. Houston was a man of education and of literary aspirations, and his opinions, and those of the "judicious friends" who aided him, were advanced, for that time. The contest in the Convention was between the men of theory, the doctrinarians, led by Houston, with General Cocke as an able assistant, and the practical men, led by Sevier, and the triumph of common sense, if hard-won, was complete.

Certain of the more unique and characteristic features of the rejected Constitution are worthy of consideration. The Declaration of Rights followed the North Carolina Constitution literally. The legislative

power was vested in one body, which was to be composed of the citizens "most noted for wisdom and virtue," provided they owned one hundred acres, or fifty pounds worth of land. No person was to be eligible to any civil office, who was of immoral character or guilty of "such flagrant enormities as drunkenness, gaming, profane swearing, lewdness, Sabbath breaking and such like," or who should, either by word or by writing, deny any of the following propositions:

1. That there is one living and true God, the creator and governor of the Universe.

2. That there is a future state of rewards and punishments.

3. That the scriptures of the Old and New Testaments are given by divine inspiration.

4. That there are three divine persons in the Godhead, co-equal and co-essential.

The same section which created these limitations also excluded from the Legislature, "ministers of the gospel, attorneys at law, and doctors of physic."

All acts were to have explanatory preambles, and no bill could become a law at the first session to which it was presented.

The House of Representatives was to choose its own Speaker, and "all the other officers, Treasurer, Secretary of State, Superior Judges, Auditors, Members of Congress." But it was declared that, as a "free people have a right to free suffrage for all

officers of the government that can be chosen by the people, the free men of this State shall elect Governor and Counsellors, Justices of the Peace for each county, Coroner, and Sheriff," and all officers except such as the Assembly was empowered to elect. The Governor was to be chosen annually.

The State was to be divided into six grand divisions, each of which was to elect a "Counselor" These "Counselors" were to be a dissolving board, divided into three classes, the members of one class to be changed each year. The Governor and the Council were to meet annually with the representatives.

Two-thirds of the "Counselors," were to make a quorum, and they, with the Governor, were to have the pardoning power and to exercise generally the functions of administration.

The "Counselors," and the Governor also were to have the extraordinary power of laying embargoes. Justices of the Peace were not to be allowed compensation, and in all cases salaries were to be "as moderate as possible." It was provided that no one should be chosen to office who was "not a scholar to do the business, nor unless acquainted with the laws of the country in some measure, but in particular with every article of the Constitution."

It was ordered that: "To prevent the civil power usurping spiritual supremacy, the establishing of professions, denominations or sects of religion, or patronizing ecclesiastical hierarchies and dignitaries, also to

secure religious liberty and the rights of conscience forever inviolate, every citizen of this Commonwealth shall forever have full and free liberty to join himself to any society of christians he may judge most for his edification, and shall experience no civil or legal disadvantages for his so doing." There were additional provisions securing unlimited liberty of opinion, but it might be difficult to maintain the proposition that this Constitution would have established freedom of religion, as one condition to office holding was a perfect orthodoxy. A citizen might have held whatever opinion he pleased, but he would not have been eligible to office unless his beliefs were entirely orthodox.

Imprisonment for debt was authorized, but except in cases where the presumption of fraud was great, the debtor could not be held after delivering his estate for the benefit of his creditors.

There was to be a University near the centre of the State, and if "experience should make it appear to be useful to the interests of learning," a grammar school conducted by masters of "approved morals and abilities" and supported by the public, was to be erected in each county.

Freedom of the press was established, and in no case were printers to be prosecuted, provided they would disclose the authorship of the offensive publication.

The Constitution was to be "drawn out into a familiar catechetical form," and taught in all the schools.

The Constitution of 1796, was so drawn out by Willie Blount, and I have before me a copy of this work, which was printed at Knoxville by Geo. Roulstone in 1803.

Every free inhabitant of the State was to be entitled to vote after reaching the age of twenty-one years.

The popular aversion to lawyers was manifest in a provision for arbitration which was intended to avoid the necessity for litigation It is probable that a more effective method of securing discord and of making lawyers indispensable never was devised.

The forty-fifth section, contained one of the empirical provisions. It ordained that in every fifth year twenty-four freeholders should be elected as a "Council of Safety," who, during a year and a day next succeeding their election, should have full power, and whose duty it should be, to inquire whether the Constitution had been preserved; whether all public servants had faithfully performed their duties; whether taxes had been justly laid and collected, and the laws "duly exercised" This extraordinary Council was also to recommend impeachments in proper cases, and the repeal of unconstitutional laws, and was to fix the salaries and fees of all public officers. This section probably was taken from the Pennsylvania Constitution of 1776, and substantially the same pro-

vision was adopted in the Vermont Constitution of 1793.[15]

This rejected Constitution had not only the approval but also the ardent support of many influential citizens. Its importance is in the fact that, in part at least, it was the product of the Franklin people. Mr. Houston represented a numerous and strong constituency, and his paper may be examined with profit, as an expression of the mind of that constituency on important questions of politics, of morals and of religion.

It indicates a large increase of population, of wealth and of culture. In respect of religious freedom, we know that the Cumberland Compact was silent, and infer that the Watauga Articles were silent also, but in this Houston Constitution we have a qualified recognition of the principle in an instrument which was prepared by a Presbyterian preacher.

It is to be noted that while a property qualification for certain offices was established, suffrage was to be universal.

The strict moral requirements of Scotch Calvinism appear in the provision excluding immoral men from office, and the Scotch-Irish devotion to education in the clauses authorizing the University and the public school system. The instrument in its entirety ex-

[15]Poore's Charters and Constitutions, volume II, pages 1548 and 1882. When the first edition of this book was prepared, it was not known that a complete copy of the Houston Constitution existed but one has since been found and printed in the American Historical Magazine (Nashville), volume I, pages 53-63.

presses the mind of the more cultured and more devout component of the population. In all its essential features it was an Anglo-American Constitution, with certain unwise and purely empirical features added.

When it had been voted down, by a very small majority, Sevier proposed and carried the adoption of the North Carolina Constitution, with such immaterial modifications as the circumstances required. The result was the adoption of the good parts of the Houston Constitution, and the rejection of the bad parts, because, as already stated, Mr. Houston had made the Carolina Constitution the basis of his scheme.

The repeal of the cession Act, and the conciliatory Legislation which accompanied it, had caused many of the Franklin people to withdraw their support from the new State, and the same result, in some measure, followed the rejection of the Houston Constitution. Not a few who were opposed to reconciliation with North Carolina became lukewarm in sentiment toward a State whose representatives were incapable of perceiving the merits of so excellent a Constitution. Consequently there were three factions in existence by the end of the year 1785. That a State so unfortunate in its infancy could have long life was impossible.

The Convention which adopted the Constitution, sent William Cocke with a memorial and a copy of the Constitution to Congress, seeking the recognition of Franklin as one of the United States, but the ap-

plication was denied, and the mission was in all respects unsuccessful.

In November, 1785, the Legislature of North Carolina passed an act authorizing elections of representatives in the Franklin counties under the "inspection of any three good and honest men." [16]

This plan was adopted because the separatist faction was still in control, although it was visibly weakening.

The result was unbounded discord and confusion. The head of the North Carolina party at this time was John Tipton, an honest and excellent man, of great courage and of a positiveness which at times became obstinacy. He was the personal enemy of Sevier, and his opposition was fearless, persistent and, in this instance, effective.

There were now two organizations, each claiming sovereign rights, levying taxes, calling out the militia, and holding courts.

In November, 1786, North Carolina passed another Act to "pardon and consign to oblivion the offense and misconduct" of the people of Franklin.[17]

By the same Act all taxes accrued from the end of 1784, to the date of the Act were relinquished.

At the same session Sullivan County was divided, and the County of Hawkins created, covering the ter-

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[16] Acts of North Carolina, 1785, November Session, chapter XLVI.

[17] Acts of North Carolina, 1786, November Session, chapter XXIII.

ritory of the new Franklin County of Spencer, and, as an additional measure of placation, a commission was appointed to select a "centrical" point for holding the courts of Sullivan County.[18]

About this time, and as a consequence, probably, of these measures and of the very firm and dignified course of the executive of North Carolina, General William Cocke and Judge Campbell were appointed commissioners of Franklin to treat with North Carolina. Campbell was disabled by an accident, but Cocke appeared before the General Assembly of North Carolina and delivered an address of great length and eloquence, but without effect. In March, 1787, at the suggestion of Governor Caswell of North Carolina, a conference was held between Governor Sevier and Col. Evan Shelby, representing North Carolina, at which an agreement was reached that, until the next meeting of the General Assembly of North Carolina, the rival States should mutually forbear the assertion of their claims, and, to a certain extent should cooperate for the protection of public interests.[19]

This was wise and commendable, but the agreement was not popular with either party, was not well carried out, and produced only temporary benefit. At the next session of the Assembly of North Carolina another Act of oblivion was passed, extending the pro-

[18]Acts of North Carolina, 1786, November Session, chapters XXXIV and LIV.

[19]Ramsey's Annals of Tennessee, page 357.

visions of the Act of 1785 to all persons "desirous" of being pardoned.[20]

By this time the end was in sight. Sevier's term would expire March 1, 1788, he was not eligible to another term, there was no semblance of a Legislature to choose a successor, and no competent man willing to take the place. It was at this period, when the always unstable fabric of the new State was visibly and rapidly falling to pieces, that the first noteworthy collision with the North Carolina authorities occurred. While Sevier was away from home, the North Carolina sheriff seized his negroes, under legal process, and confined them at Tipton's house. Naturally provoked by this proceeding, Sevier gathered a strong party and went through the form of besieging Tipton's house, but throughout the episode he acted with hesitation and with a perceptible and very proper desire to avoid bloodshed. The affair, after all, was rather a comedy than a tragedy, and Sevier probably suffered more loss of reputation by it than by any other event in his career. His mistake was in entering upon the undertaking, and he was right in not forcing a bloody issue.

After March the first, 1788, no effort was made to keep up the Franklin government. North Carolina, if wrong, or at least hasty and inconsiderate in the first instance, had fairly atoned for the error, and it was now not only right but necessary for the Franklinites to return to their allegiance.

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[20]Acts of North Carolina, 1787, chapter XXVII.

In November, 1788, the Legislature of North Carolina once more extended pardon to all the people of Franklin except that Sevier was denied the right to hold office.[21]

Nevertheless he was elected in 1789, to the Legislature, and appeared at the opening of the session. Thereupon his disability was removed, and he entered upon his long and successful political career.[22]

Meanwhile, however, he had been arrested for treason, handcuffed, and carried across the mountains for trial, but was never tried. His old army friends secured his release on bail, and the case was not pressed. It is to be regretted that the actual facts of this incident do not in the least support the highly interesting accounts of it which have been printed from time to time.

Having followed the main thread of the story of Franklin to the end it is necessary to notice certain less important but interesting facts.

The Legislature of Franklin, chosen in pursuance of an Ordinance of the Jonesboro Convention, met in the Spring of 1785, in the midst of the period of travail over the Constitution, and, after electing Sevier Governor and appointing Judges and other necessary officers, began vigorously to make laws. One of its early Acts was: "for the promotion of learning in Washington County," and under its provisions Martin

[21]Acts of North Carolina, 1788, chapter IV.
[22]Acts of North Carolina, 1789, chapter VII.

Academy, which had been established as a private school by Samuel Doak in 1780, and incorporated by North Carolina in 1783, procured now, a new charter from Franklin. This was the first legislative Act west of the Alleghanies, for the encouragement of learning, and was appropriately applied to the first literary institution that had been established in the Mississippi Valley.

The financial system established by this Legislature is both instructive and entertaining. In addition to the ordinary medium of exchange, divers commodities were made legal tender, as for instance, tow linen at one shilling nine pence a yard; linsey at three shillings a yard; beaver skins at six shillings each; raccoon skins at one shilling and three pence; bacon and tallow at six pence a pound; rye whiskey at two shillings and six pence, and peach and apple brandy three shillings, a gallon. There is a tradition that the Governor was always paid in mink skins, but it appears that among the Acts of the Assembly, probably in 1787, was one fixing the Governor's salary at 1,000 deerskins and that of the Secretary at 500 raccoon skins. The same Act seems to have provided that a justice should receive four muskrat skins for signing a warrant, and the constable one mink skin for serving it.[23]

The excellent Dr. Ramsey was much mortified by

[23]American Historical Review, volume VIII, page 286; article by G. H. Alden, note 2.

the merriment caused by this fiscal legislation, and devoted two pages to the effort to show that Franklin was not the only frontier State that had resorted to such expedients. He was consoled by the fact that in early times in Virginia, wives were bought with tobacco; that in North Carolina as late as 1772 debts were paid in hides and tallow; that maize was at one time legal tender in Massachusetts, and musket balls current at a farthing apiece, and that in 1580 a New England town paid its taxes in milk pails. It is also a fact that the man who, in those days, had a mink skin or a "coon" skin knew that it had a value, and could tell approximately what the value was, which was not always true of the paper money then in circulation.

When the separation movement began it was supported by a large majority of the people, including John Tipton. Sevier became recalcitrant at one time, as we have seen, and it is possible that his judgment did not approve the movement from the first. Writing to Gen. Joseph Martin, March 27, 1788, he calls Martin to witness the fact that he had been "dragged" into the movement, but this statement probably refers to his course after the repeal of the Cession Act.[24]

There seems to have been more hesitation among the leaders than among the people at large. Conflicting ambitions doubtless caused the first dissensions,

[24]Calendar of Virginia State Papers, volume IV, page 416.

while disaffection was greatly increased by the conciliatory and, apparently fair, attitude which North Carolina assumed as soon as the movement took shape. The rejection of the Houston Constitution furnished an excuse for the defection of a number of leaders, who probably were entirely willing to find a plausible reason for deserting a cause which already was failing. John Tipton resumed his allegiance to North Carolina among the first, and in 1786 was elected to the State Senate. Sevier felt keenly the desertion of those who had at first supported the movement, and had "dragged" him into it. In the letter to Martin, already quoted from, he said, "How far our pretended patriots have supported me as their pretended chief magistrate I leave the world at large to judge." [25]

In the same letter he declared that he had supported the authority of Franklin while in office, and expressed regret that the people did not have spirit enough to support it farther.

By the beginning of 1787 a majority of the people had submitted to the authority of North Carolina, and that State was exercising jurisdiction over all the Franklin counties except the newly created ones, Caswell and Sevier. The existence of two rival governments in the same territory, unavoidably, produced confusion and disorder, and many times threatened to cause bloodshed, and the history of the period lacks

[25] Calendar of Virginia State Papers, volume IV, page 417.

dignity and attractiveness. The disturbed condition of society was disastrous to the progress of the country in population and wealth, and the Cumberland settlements doubtless profited largely by the misfortunes of Franklin. It is remarkable that protracted and intense factional strife produced so little actual violence, the explanation being that the people were the friends of law and order and that the asperities of partisanship were tempered by knowledge of the fact that the division was artificial, and necessarily temporary.

It would be interesting to consider the large plans of Arthur Campbell of Virginia, and others, for the formation of a "greater" Franklin, but the subject is outside the scope of this volume. It is not inappropriate, however, to refer to the spirit and purposes of the original movement. Dr. Ramsey's "Vindication of Franklin" is an able and convincing paper, but hardly necessary, and not more effective than the statements contained in a communication to the Governor of North Carolina from the General Assembly of Franklin, dated "Jonesborough," March 22, 1785, preserved in the archives of North Carolina, and published in the Charlotte *Observer*, October 23, 1904, from which the following extracts are taken: "We observe your Excellency's candour in informing us that the reason North Carolina repealed the Cession Act: was because the sense of Congress was to allow the State of North Carolina nothing for the land

ceded. The truth of that assertion we will not undertake to determine; but we humbly conceive the terms on which Congress was empowered to accept the Cession were fully expressed in the Cession Act itself, consequently every reason existed for not passing the Cession Act that could have existed for the repeal, except, that of doing Justice to the United States in general, who upon every principle of natural justice are equally entitled to the lands that have been conquered by our joint efforts.

"We humbly thank North Carolina for every sentiment of regard she has for us; but are sorry to observe that it is founded upon principles of interest, as is apparent from the tenor of your Excellency's letter. We are therefore doubtful that when the cause ceases which is the basis of your affection we shall consequently lose your esteem.

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"Reflect upon the language of some of the most eminent members in the General Assembly of North Carolina at the last Spring session when the members from the western country were supplicating to be continued a part of your State. Were not these their epithets? 'The inhabitants of the western country are the off scourings of the earth, fugitives from justice, and we will be rid of them at any rate.' The members of the western country upon hearing these unjust reproaches and being convinced it was the sense of the General Assembly to get rid of them,

consulted each other and concluded that it was best to appear reconciled with the masses in order to obtain the best terms they could, and were much astonished to see North Carolina immediately on passing the Act of Cession enter into a resolve to stop the goods that they by Act of the General Assembly had promised to give the Indians for the lands they had taken from them and sold for the use of the State. The inadequate allowance made the Judges who were appointed to attend the courts of criminal justice, and who had to travel over the mountains, amounted to prohibition as to the administration of justice in this quarter, and although the Judge appointed on this side of the mountain might, from the regard he had to the administration of justice in the Cumberland country, have held a court there, yet as your Excellency failed to grant him a commission agreeable to the Act of Assembly, he could not have performed that service had he been ever so desirous of doing it. In short the western country found themselves taxed to support government while they were deprived of all the blessings of it. Not to mention the injustice done them in taxing their lands, which lie five hundred miles from trade, equal to land of the same quality on the sea shore; the frequent murders committed by the Indians on our frontiers, have compelled us to think on some plan for our defense. How far North Carolina has been accessory to these murders we will not pretend to say. We only know she took the land the Indians

claimed, promised to pay for it, and again, resolved not to do it and that in consequence of that resolve the goods were stopped.

"You say it has been suggested that the Indian goods are to be seized and the commissioners arrested when they arrived on the business of the treaty. We are happy to inform you that that suggestion is false, groundless, and without the least foundation, and we are certain you cannot pretend to fault us, that the goods are stopped by a resolve of the Assembly of your State, and if your State are determined to evade their promise to the Indians, we entreat you not to lay the blame upon us who are entirely innocent and determined to remain so. It is true we have declared ourselves a free and 'Independent State' and pledged our honors, confirmed by a solemn oath, to support, maintain and defend the same. But we had not the most distant idea that we should have incurred the least displeasure from North Carolina, who compelled us to the measure, and to convince her we still retain our affection for her, the first law we enacted was to secure and confirm all the rights granted under the laws of North Carolina in the same manner as if we had not declared ourselves an independent State. Have patronized her Constitution and laws, and hope her assistance and influence in Congress to precipitate our reception into the Federal Union. Should our sanguine hopes be blasted, we are determined never to desert that independence which we are bound by every

sacred tie of honor and religion to support. We are induced to think that North Carolina will not blame us for endeavoring to promote our own interest and happiness, while we do not attempt to abridge hers, and appeal to the impartial world to determine whether we have deserted North Carolina, or North Carolina deserted us.

"We will be pleased to lay these our sentiments before the General Assembly, whom we beg leave to assure that should they ever need our assistance we shall always be ready to render them every service in our power, and hope to find the same sentiments prevailing in them towards us and we hereunto annex the reasons that induced the Convention to a declaration of independence which are as follows:

"1st. That the Constitution of North Carolina declares that it shall be justifiable to erect new States westward whenever the consent of the Legislature shall countenance it, and this consent is implied, we conceive, in the Cession Act, which has thrown us into such a situation that the influence of the law in common cases became almost a nullity and in criminal jurisdiction had entirely ceased, which reduced us to the verge of anarchy.

"2nd. The Assembly of North Carolina have detained a certain quantity of goods which was promised to satisfy the Indians for the lands we possess, which detainure we fully conceive, has so exasperated them that they have actually committed hostilities upon us

and we are alone impelled to defend ourselves from their ravages.

"3rd. The resolutions of Congress, held out from time to time, encouraging the erection of new States have appeared to us ample encouragement.

"4th. Our local situation is such that we not only apprehend we should be separated from North Carolina, but almost every sensible disinterested traveler, has declared it incompatible with our interest to belong in union with the eastern part of the State, for we are not only far removed from the eastern parts of North Carolina, but separated from them by high and almost impassable mountains which naturally divide us from them; have proved to us that our interest is also in many respects distinct from the inhabitants of the other side, and much injured by an union with them."

This is the case that Franklin made for herself and by it she must stand or fall.[26]

While there can be no doubt that the people of Franklin desired, and intended to create, a separate and independent State, it is certain that they meant it to be an American State. They were separatists only in the sense that they were determined to separate from North Carolina, who after all was only their adoptive mother. They desired to become one of the United States; they appealed at once, and earnestly,

[26]See also, Preamble to Temporary Constitution, Charlotte *Observer*, September 25, 1904.

to Congress for recognition, giving their State the name of the most conspicuous and influential patriot after Washington, and applying to him for advice and assistance. It is interesting to note that in the Convention which framed the Federal Constitution it was declared in debate in July, 1787, that probably Franklin would soon become a State.[27]

It may be affirmed with confidence that there was not a moment when the Franklin people were not loyal to the Union, or the Confederation, or when they cherished a desire for any other political connection than with the United States. It is not necessary to consider here the well known correspondence of James Robertson with the Spanish colonial authorities further than to say that Robertson had no connection with the Franklin movement, but remained loyal to North Carolina throughout the disturbance, and sought to placate the Spaniards almost exclusively for the purpose of securing the right to navigate the Mississippi. Sevier also was at one time in correspondence with Spanish officials, but he was then the defeated and outlawed leader of a lost cause, representing no one but himself, and the utmost that can be alleged against him, with any show of reason or justice, is that in his disappointment and humiliation he was willing to accept foreign aid against North Carolina. There is no justification for putting him in the category of intriguing specu-

[27]Documentary History of the Constitution of the United States, volume III, page 412.

lators and adventurers like Wilkinson. Even if he had been willing to go to the Spaniard, he would have had no following, because the people were staunchly American, and, at the time when he was engaged in this correspondence, the authority of North Carolina had been recognized by practically all the people of Franklin, who were distinctly hostile to Spain, and had been ready to go to war against her.[28]

If the Franklin movement, technically considered, was treason against North Carolina, it involved no treason in any sense, against the United States or the American people.

The legality of the Acts of the Franklin government has been the subject of adjudication several times in the Courts of Tennessee, and in 1801 administrations of estates under it were validated by an Act of our General Assembly.[29]

In 1803 marriages solemnized under the authority of the State of Franklin were confirmed, and issue thereof declared legitimate.[30]

In 1815 all written instruments proved or acknowledged in court and admitted to record or registration under the laws of Franklin, were declared as valid as if made under the laws of Tennessee or North Carolina.[31]

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[28]American Historical Review, volume VIII, pages 287-288.
[29]Acts of Tennessee, 1801, chapter XXIV.
[30]Acts of Tennessee, 1803, chapter XXV.
[31]Acts of Tennessee, 1815, chapter I.

Our Supreme Court has held that while the records of the Franklin courts are not themselves legal evidence, the proceedings of those courts might be proved by witnesses, and that their decisions were obligatory unless incompatible with justice.[32]

In 1786 the Legislature of North Carolina declared, in effect, that the decisions of the Franklin courts should stand when compatible with justice, but that persons unjustly injured by them should have remedy at common law.[33]

In conclusion it would seem that the impartial student can hardly deny that, in the beginning, the Franklin movement was justifiable, the people believing, not without reason, that a government of their own was a necessity. In view of the fact that the Franklin country unquestionably belonged to North Carolina, and that the State had formally declared that its jurisdiction should continue until the acceptance of the cession by the general government, the technical right was with North Carolina, from the first. Its conduct after the cession, and the manner and spirit in which the cession was made may be censured severely and justly.

The repeal of the cession Act removed the immediate cause of the declaration of independence, but at the same time it suggests a consciousness of the in-

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[32] *Ingram's Heirs* v. *Cocke*, 1 Tennessee Reports, page 22.
[33] Acts of North Carolina, 1786, chapter XXIII.

sufficiency of the reservation of jurisdiction by the State, and of the injustice of its policy after the cession.

Probably it is true that the movement should have been abandoned when the cession was recalled, but there were other grounds of just complaint and it was not so easy to consider the matter with impartiality and serenity then, as it is now after the lapse of more than a century, and however philosophically we may consider the subject, a Tennesseean will with difficulty withhold his sympathy from Franklin.

During the existence of the Franklin government, many settlers, relying on its treaties with the Indians, had taken up lands South of Holston, French Broad and Pigeon Rivers. The authority of North Carolina, when restored did not extend to this territory, and the people being left to their own devices, formed a government of their own declaring their purposes in the following language: "Being at present, destitute of regular government and laws and being fully sensible that the blessings of nature can only be obtained and rights secured by regular society, and North Carolina not having extended her government to this quarter, it is rendered absolutely necessary for the preservation of peace, the good order, and the security of life, liberty and property to individuals, to enter into the following social Compact as a temporary expedient against greater evils." [34]

[34]Ramsey's Annals of Tennessee, page 435.

Under this Compact the people south of French Broad and Holston lived until their lands were incorporated in the County of Sevier in 1794. At least such seems to be the fact although it has been asserted that their government possessed no vitality after 1790.

CHAPTER IV.

NORTH CAROLINA INSTITUTIONS.

In May, 1790, Congress organized the "Territory of the United States South of the River Ohio," assigning to it the form of government already in operation in the North West Territory. North Carolina had stipulated, however, that her own laws should remain in force in the "western lands" until changed by the Legislature.

The Territorial Legislature made very few changes, and when Tennessee became a state in 1796, the laws of North Carolina were, without any material exceptions, still in force.

The Tennessee Constitution adopted in 1796, was essentially a reproduction of the North Carolina Constitution of 1776, and the laws of the parent State long remained the laws of Tennessee. Hence, a survey of the Colonial and of the earlier State institutions of North Carolina is a necessary part of a study of the Constitution and institutions of Tennessee.

North Carolina was altogether an English Colony, so far as its laws and institutions were concerned. Its institutional history began in 1663 when the King of England made to the Lords Proprietors the first of the famous grants of lands, embracing North and

South Carolina, Tennessee and indefinitely more. In that year Sir William Berkeley, Governor of Virginia, representing the Proprietors, went to Albemarle, and appointed William Drummond, Governor. According to Berkeley's instructions from the Proprietors the Governor was to nominate six persons as a Council, and the Governor and the Council were to have the authority to make laws, by, and with, the advice and consent of the free-holders and freemen, or a majority of them, their deputies or delegates. The laws so enacted were to be transmitted, within one year, to the Proprietors for approval or rejection. The Governor and Council were to have power to grant land to settlers, and to do all other things necessary to the welfare of the people.[1]

This order of the Proprietors was acted upon, but to what extent cannot be stated with certainty. It appears that Drummond granted lands, and sat with his Council as a court, and it is reasonably certain that there was a meeting of the Assembly in 1665. In that year the Proprietors adopted a plan of government which amounted to little more than a confirmation of the instructions theretofore sent out. It is known as the Concessions of 1665, but was not received in the Carolinas until 1667. These Concessions were intended to be temporary, but we shall see that, in effect, they became permanent. Looking to the purposes of

[1]Colonial Records of North Carolina, volume I, pages 49-52.

the Proprietors, it is clear that they intended to create, upon a plan to be described later, eight distinct governments or counties under their own direct supervision, and three, to-wit, Albemarle, Craven, and Clarendon, were actually organized. Albemarle was at first the smallest of these, but its jurisdiction was steadily extended, and at the end of the 17th century it had come to be known as North Carolina.

The charters of all the proprietary Colonies have many features in common, but the closest resemblance, perhaps, is between those of North Carolina and Maryland. In these the strong liking of the Stuart Kings and their favorites for the Palatine form of government for the colonies, is manifest. The Palatinate of Durham, was the best known, the most complete, and the most persistent of its class in England. It was a survival of extreme feudalism, an almost independent jurisdiction, established originally for the protection of the border, which was constantly threatened with hostile invasion. It dealt with the sovereign only through the Palatine, who was the chief source of authority, who pardoned treasons, murders, and felonies, and appointed all judges and justices of the peace; all writs and indictments ran in his name, as in other counties in the King's name, and all offenses were said to be done against his peace. Blackstone compares the Palatinates to "the regal independent jurisdictions usurped by the great Barons of the Continent, during

the weak and infant state of the first feudal kingdoms of Europe." [2]

The English Palatine was perhaps, in theory, an autocrat, but in fact, despite variances of name and form, English laws, precedents and traditions, prevailed in Durham, and in the other counties Palatine as elsewhere in England, and public opinion was as effective as in other Anglo-Saxon communities. In the counties Palatine, there seems to have been no direct recognition of the rights of the people to have a part in making laws, but indirectly the popular will found expression, and the policy of the Palatine in general, wisely, conformed to it. The Carolina charters provided for making laws with the assent of the people, thus modifying the Palatine form of government wisely and justly. It must suffice for our present purpose to say, generally, that the King and the Proprietors, regarding the polity of the Palatine County of Durham, as especially favorable to aristocracy and opposed to a "numerous democracy," desired to establish it in North Carolina, and succeeded, for a while, to the extent of a few names and a few forms, but that from the first the people rejected the feudal institutions and artificial laws thus sought to be imposed, and held fast to the English Constitution, as it existed at the time and was applicable to their situation. If there were real and effective modifications, they were not revivals of feudalism, but assertions of

[2] 1 Blackstone, pages 117-118.

a larger liberty. Never in the history of the English race have the form and the substance of government been anywhere so radically and so constantly different as in proprietary Carolina, and especially in North Carolina. The persistent effort to force upon the people, antiquated and cumbrous laws and institutions, was a principal cause of the disturbances that so frequently occurred under the proprietary government.

The original counties were divided into precincts, and these subdivisions continued to bear this name until 1738, when they were called counties. In 1691, all the counties were placed for the first time, under one governor, appointed by the Proprietors who was called the Governor of Carolina, and who with one Council and one Assembly, governed all Carolina, and this arrangement continued until 1712. The seat of government was Charleston, in South Carolina. Between Charleston and the Albemarle settlements the distance was great, and the intermediate country was unsettled. Communication therefore being difficult and the people of Albemarle finding it exceedingly inconvenient to send delegates to Charleston, the Proprietors authorized the Governor of Carolina to establish a subordinate government in Albemarle, with such powers as he should see fit to confer.[3]

A Deputy Governor was accordingly appointed for Albemarle, who did not deal directly with the Pro-

[3]Colonial Records of North Carolina, volume I, pages 380-381.

prietors, but with the Governor of Carolina at Charleston.[4]

This is not to be considered as the separation of the two portions of the Province, for conditions had made any really organic union impossible. The Deputy Governor of North Carolina was not appointed by the Governor of South Carolina, but by the Governor of Carolina, who was empowered to appoint also a Deputy Governor for South Carolina. Each Deputy Governor had associated with him as advisers a Council of twelve, six appointed by himself and six by the Assembly.

In 1710 the Proprietors declared the Governor of North Carolina independent of the Governor of Carolina, and the arrangement by which North Carolina received a separate provincial government, became effective in 1712. The Governor of Carolina seems to have been referred to frequently, by the Proprietors and others, as the Governor of South Carolina, as he dwelt in the southern Province, and, often, gave personal supervision to its affairs.

The Grand Assembly, as the Legislature was now called, was composed of the Governor and the Council, and twelve representatives chosen annually by the freeholders.[5]

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[4]Hawk's History of North Carolina, volume II, pages 492-494; Colonial Records of North Carolina, volume I, pages 373 and 380; Bassett's Constitutional Beginnings of North Carolina, pages 10-11.

[5]Bassett's Constitutional Beginnings of North Carolina, page 55.

Hawks says that in 1667 a constitution for the Carolinas was granted but undoubtedly he refers to the concessions of 1665. Under this government the people seem to have been prosperous and contented, but the Proprietors had large ideas, and to John Locke, a protege of the great Shaftesbury, was assigned the duty of formulating a plan worthy to be acknowledged by his illustrious friend. The result was the "Fundamental Constitutions of Carolina," a plan of government, which considered with reference to the purpose for which it was designed, was as impracticable as the constitution of Utopia. The Proprietors were profoundly impressed by it, but from the first they doubted their ability to put it in operation in the forests and swamps of Carolina.

The "Grand Model" has been treated with too much levity, being a favorite subject of satire and declamation. It was unfit for Carolina, and in parts, indisputably absurd, but it was not wholly bad and in certain respects it is entitled to praise. It was the joint production of a politician who, while regarding an aristocracy as essential to good government, leaned toward toleration in religion, and of a philosopher who was inexperienced in affairs, but was, for that time, a liberal in politics, and who was not actuated wholly by a desire to promote the interests of a selfish corporation. Its Palatines, Landgraves, and Caciques, its Seignories and Baronies, its seven impossible grades of society, its complicated feudal machinery, and pon-

derous nomenclature, amuse the practical men of today, but the student of institutions is impressed by a few excellent features. The court system, especially in the matter of local courts, was worthy of praise: trial by jury was guaranteed; township government was ordained, religious liberty declared, and biennial Parliaments provided for.

When in 1670 the Proprietors sent over the "Grand Model" unabridged, to be exhibited and admired, they sent with it a plan of temporary government, consisting of written instructions for the conduct of affairs until conditions should be suitable for its full adoption. The introductory clause of these instructions is in part as follows. "Not being able at present, to put it fully in practice by reason of the want of Landgraves, and Caciques, and a sufficient number of people, however, intending to come as nigh it as we can, in the present state of affairs in all the colonies of our said Province, you are required," etc.[6]

These instructions made no material change in the form of government and the establishment thus confirmed, continued to exist, even after the Fundamental Constitutions were formally declared to be in effect. Referring to the peculiar condition thus created, Bassett says, "The original instrument, (the Fundamental Constitutions) was received by the people of North Carolina, and was afterwards pleaded as the evidence

[6]Colonial Records of North Carolina, volume I, page 181; Bassett's Constitutional Beginnings of North Carolina, page 42.

of a compact between the people and the Proprietors. It never replaced the temporary form, but continued for some time as a kind of Constitution in remainder, awaiting the time when it might come into its rights. This time never came. A more popular system took by prescription, and held by force, the authority of the government, and its rights were recognized in the revisal of 1715." [7]

The scheme of government contemplated by the Concessions of 1665, and confirmed by the instructions of 1670, was as follows: At the head was the Palatine, who was always the oldest of the Proprietors; each Proprietor provided a Deputy, resident in the Province, and the Deputy of the Palatine became the Governor or Deputy Palatine. The Proprietors were supreme, having in legislation, both the initiative and a veto. They appointed the chief officers, and these named their subordinates. The Governor was required, usually, to act with the concurrence of at least three of the Deputies, but independently, he approved or disapproved measures of the Council and of the Assembly, and was commander of the militia, and appointed all its officers. There was a General Court corresponding to the county court of Durham, and held by appointees of the Proprietors, and a precinct court like the inferior courts of Durham and the ordinary English county courts.

[7] Bassett's Constitutional Beginnings of North Carolina, pages 41-42.

The charters as we have seen, gave the Proprietors the right to make laws, with the advice, assent and approbation of the freemen of the Province, and this clause the Proprietors construed as giving them an absolute veto. They were also required to cause the freemen or their delegates, to assemble from time to time in such manner as should seem to them best, and liberally construing this last provision in their own favor, they seem to have arranged the election districts, the basis of representation, and all similar matters, so as to retain a practically unlimited control of the Assembly, displaying in this a political astucity almost worthy of our own time. Of this early government Bassett says, "The executive powers were all that were necessary for the efficient management of internal affairs. Only in that they had not the actual sovereignty, did the Proprietors lack royal powers; and yet their authority was, for the purposes of their government, as ample as that of any royalty." [8]

In emergencies they were authorized, as were the Maryland Proprietors, to enact laws without the approval of the freemen.

We have seen that the desire of the Proprietors to have the whole of the "Grand Model" in operation was never gratified. Five different editions of it were sent over, but the last, which arrived in 1698, contained only forty of the one hundred and twenty-six

[8]Bassett's Constitutional Beginnings of North Carolina, page 31.

articles, and was therefore necessarily shorn of much of the dignity and grandeur of the great original.[9]

Probably as early as 1693 the Proprietors abandoned the hope of setting up the unabridged Constitution, although it continued long afterwards to be the object of their affectionate admiration. It is an interesting fact that the "Model" was cordially approved, by the most enlightened men of England and of the continent at the time of its appearance.

In 1715 there was an authorized revisal of the laws of the Province, in which the temporary Constitution of 1670, and the laws passed under it, were recognized. After this there was no effort to establish the Fundamental Constitutions, and the people were allowed to govern themselves substantially as in Virginia and in the other royal colonies. The institutional history of the Carolinas thus presents a singular obscurity and complication for a period of fifty years, and more. From 1663 to 1667, the people were practically left alone, from 1667 to 1670, the authority exercised by the Proprietors was very slight, and no important departure from ordinary English methods was attempted so far as we know. In 1670, came over the "Grand Model," but with it the temporary scheme. The result was that the temporary plan, which did not materially change the existing order, was accepted and became permanent, and the perfect "Grand Model"

[9]Bassett's Constitutional Beginnings of North Carolina, page 43; Colonial Records of North Carolina, volume III. pages 452-453.

was rejected by the obstinate and sound common sense of the people.

To describe the actual conditions in Carolina, after the adoption of the Fundamental Constitutions by the Proprietors, is a difficult task, but speaking generally, they were as follows. It was in 1669 that the Proprietors organized themselves for the first time, six being present, all of whom were, in pursuance of the Fundamental Constitutions, appointed to offices with the most imposing titles, but nearly all without duties. For the absentees were reserved two other offices with equally impressive names. The first and by far the most important officer, was the Palatine, and he alone among the Proprietors, seems to have been charged with any actual duties.

The chief executive officer, and the active head of the government was the Governor or Deputy Palatine, an officer not provided for by the "Grand Model," but created by the temporary Constitution. He resided in the Province, was the High Chancellor, executed all the laws, presided over the Council, and his approval was necessary to the validity of legislation. He also commanded the militia, and appointed all its officers, so that his duties and powers were at once executive, legislative, and judicial, and of almost unlimited extent.

The Council, prior to 1670, was selected by the Governor. Under the temporary Constitution of 1670, there were at first, ten Councillors, five being Deputies

of the Proprietors intended to represent the colonial nobility, and five elected by the Assembly. Councillors of the first class were called Deputies, and by a law passed in 1691, it was ordered that the Council be composed entirely of Deputies. In 1724, the Deputies were abolished, and the Council thenceforth, was composed of twelve or less, all appointed by the Proprietors.[10]

It was intended that the Governor and the Council should act as checks upon each other. Proceeding jointly, their authority was almost unlimited. When the Assembly was not in session they possessed all executive powers: at least this was the case so long as the Council was chosen by the Governor and the Assembly, but when the Deputies were introduced in 1670, they with the Governor, constituted what was known as the Deputy Palatines court, which was distinct from the Council, although the Deputies were members of that body.

This court was practically in control of the Province, as it could convoke the Assembly, veto its acts, and the acts of the Council, pardon offenses, and indeed exercised all the powers of the Proprietors, not specifically granted to other branches of the government. These large powers passed to the Council, which was established in 1724 when the Deputies were abolished.

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[10]Bassett's Constitutional Beginnings of North Carolina, page 50.

As thus finally established the Council was a court of record, and as it seems, was, at its election, also a court of probate. The Governor and Council formed an administrative body which appointed all the officers not named by the Proprietors, such as Associate Justices of the General Court, Justices of the Peace, and Provost Marshals.

The legislative body, the General Assembly, as we have seen, met first in 1665, before the "Concessions" of that year came to Carolina.[11]

How it was constituted is not certainly known, but after 1667, and until 1691, it was a single body, composed of the Governor and the Council. and twelve delegates chosen by the people.[12]

Its legislative powers were ample, but all the laws were subject to the veto of the Proprietors. If the acts were not approved, they remained in force a year and a half. All the laws were required to be signed by the Governor. In the course of time the Governor and the Council developed into a separate house, as a natural result of the habit of meeting separately, as representatives of the Proprietors, to consider the laws as they were enacted. This separation seems to have been practically accomplished before 1691, and was in that year, formally recognized by the Proprietors.[13]

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[11]Hawk's History of North Carolina, volume II, page 144.

[12]Colonial Records of North Carolina, volume I, page 167.

[13]Bassett's Constitutional Beginnings of North Carolina, page 58.

The determination of the Anglo-Saxon to govern himself was strikingly displayed in the gradual assumption of power by the lower or popular branch of the Legislature, and the concurrent loss of power by the artificial upper house. Long before the Revolution, the lower house had become supreme.

In the revised statutes of 1715 it was provided that the freemen of Albemarle County should elect, for a term of two years, five delegates to the Assembly from each precinct and those of other counties, two delegates from each precinct.

The Assembly, after 1715, met biennially, on the first Monday in November, the power to prorogue, to dissolve, and to call special sessions being in the Proprietors. The lower house had the power to expel members, to decide contested elections, and to pass money bills without the concurrence of the upper house.[14]

The judicial system under the Proprietary government consisted of the General Court, the Precinct Court, the Admiralty Court and the Court of Chancery, except that from 1663 to 1670, apparently, the Governor and the Council were the only court.

The instructions of 1670 empowered the Governor and the Council to establish courts. The creation of local courts followed the establishment of the precincts, and naturally the Governor and the Council

[14]Bassett's Constitutional Beginnings of North Carolina, page 64.

assumed the place of an appellate court. This was the beginning of the tribunal now known in North Carolina and Tennessee, as the Supreme Court. The General Court after 1670, was at first composed of the Governor and Deputies, but in 1685 the Proprietors directed the Governor to appoint four discreet men to be Justices of the County Court of Albemarle County. He was also directed to appoint a Sheriff, or Chief Judge. The number of Associate Justices varied at different times. Bassett states that in 1713, there were two; in 1716, ten; in 1724, two; and that after other changes it came to be about eight. This Court was established after much delay, certainly not before 1702, and was continued to the end of the Proprietary government.

In 1713, the office of Chief Justice was created and filled by direct appointment of the Proprietors. The Court met three times a year, and had the powers of the English courts of Kings Bench, Common Pleas, and Exchequer. From its decisions in cases involving over five hundred pounds, there was an appeal to the Crown.[15]

The General Court was also an administrative body, as the county courts of England were, appointing ferrymen, regulating fares, supervising public roads, and performing other functions, executive, adminis-

[15]Bassett's Constitutional Beginnings of North Carolina, page 68; *citing* Colonial Records of North Carolina, volume II, pages 528 and 556. But see Hawk's History of North Carolina, volume II, pages 207-209.

trative, and judicial. The executive officer of the General Court and of the Precinct Court under the proprietary government, and for nine years under the royal government, was commonly called the Provost Marshal, but in 1738, he was, by law, called the Sheriff. He appointed his own deputies, summoned juries, held elections, and performed the executive functions which under our system pertain to the office of Sheriff. There was a clerk of the General Court, paid by the fees of the office, and as early as 1679, there was an Attorney General who was appointed by the Governor and Council.

The Precinct Courts were held quarterly by the Justices of the Peace, who were appointed by the Governor and Council, the number of the Justices being, in the beginning, at the will of the appointing power. In 1716, these Courts were ordered to be held by four Justices, but at other times the law required three, one of whom was to be of the quorum. The Precinct Courts, under the proprietary government, had jurisdiction of civil cases, involving fifty pounds or under. They were the orphans courts, and like the modern county courts of Tennessee, had large administrative powers, especially in the matter of public roads.

The Chancery jurisdiction was in the Governor and Council, throughout the proprietary period, as was also the power of impeachment which is vested in the modern American senate.

The fiscal officers of the Province were the Collector of Customs, the Receiver General, who collected the crown tax, or quit rent, and the Public Treasurer, who received the taxes levied by the Assembly.

Each precinct was equipped with Justices of the Peace, a Register of Deeds, Constables, Coroners, Surveyors, and Escheators.

Such in brief was the polity of the proprietary Province of North Carolina. It will be seen that every reactionary movement failed. Some features of the Palatine government were imperfectly grafted on the Province, but in the main its institutional history displays a development of English principles and institutions as they existed outside the palatine counties, the conditions being at no time substantially different from what they would have been if no effort had been made to copy the Durham establishment or to set up the "Grand Model." The temporary Constitution of 1670 was less artificial, and reactionary than the "Grand Model," but it was really accepted only so far as it conformed to the condition of sound English public opinion and usage, modified by the circumstances of the struggling colonists. The selfish and reactionary Proprietors and their experimental state makers, contended in vain against adverse physical conditions, against the spirit of the time, and against the common sense and the stubborn independence of the colonists.

The proprietary institutions as finally established, were but little changed in substance, after the Province passed to the Crown, and the American origins of nearly all the institutions of Tennessee are to be found in the first period.

While there have been many changes of powers and duties, of methods of selection, and of court jurisdiction, we find at the last in proprietary North Carolina, as in modern Tennessee, the Governor, the bi-cameral Legislature, meeting biennially; the General Court, corresponding to our Circuit Court with an appeal to a Court of last resort; the Precinct Court, afterwards called the County Court; Sheriffs, Coroners, Constables, Justices, Registers, Public Prosecutors, and a Court of Chancery. The County Court of Tennessee, at the present time, differs very little indeed, from the Precinct Court, and until 1877, our Chancery Court had substantially the same jurisdiction and procedure as the earliest tribunal of that name in North Carolina.

The Governors Council, out of which grew the State Senate, is worthy of special attention. The North Carolina Constitution of 1776, while creating a Legislature of two branches, provided also for a Council with important advisory powers. In the territorial government of Tennessee, there was a Council which performed the functions of a Senate, after a Legislature had been established. The rejected Frankland

Constitution would have created an Assembly of one house, and a Council, and in the Tennessee Constitutional Convention of 1796, a similar arrangement was proposed but rejected. The Council was not, of course, an exclusively North Carolina institution, but was a customary feature of colonial governments. In the earliest times, its members frequently sat as constituents of the uni-cameral Legislature, and it seems that the first attempt to erect the Council into a distinct legislative body, was in Lockes "Grand Model."

Upon the subject of the Governors Council, a learned writer says, "In the year 1700, the American people had developed the Governors Council into the two main functions of the modern Senate, namely, that it should be a separate and upper house, and that its members should represent certain large localities." [16]

The proprietary government of North Carolina ended in 1729, when the Crown purchased the interests of all the Proprietors save one.

Saunders, in his prefatory notes to the Colonial Records of North Carolina says, "The transfer of the Province from the Lords Proprietors to the Crown, brought about little or no change in the practical machinery of the government, and no changes whatever in the rights of the people, but those rights depended, not upon the will of the Proprietors, not upon

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[16]Evolution of the Constitution of the United States, by S. G. Fisher, pages 125-6.

that of the Crown, but upon the well known charter of King Charles II." [17]

The commission of George Burrington, the first royal Governor, was issued January 15, 1730. It recognizes the existence of the Council and of the Assembly and declares: "We do hereby give and grant unto you, full power and authority with the advice and consent of our said Council, from time to time as need shall require, to summon and call General Assemblies of the said freeholders and planters, within your government, according to the laws and usages of our said Province of North Carolina." [18]

The next clause indicates the royal will to be that, only freeholders, and not all freemen, shall be electors, and upon this point there was dispute afterwards.

The division of the counties into precincts was continued and each precinct was also a parish, with the customary ecclesiastical appointments, and with a limited power of taxation for church purposes.

Under the royal government the King appointed the Governor, and the Council, but the Governor could fill vacancies in the Council, so as to keep the number always up to seven, and could convoke, prorogue, and dissolve the Legislature, veto all legislation, and appoint magistrates and militia officers. In 1715, the common and statute law of England, so far as con-

[17] Colonial Records of North Carolina, volume III, page XII (Preface).

[18] Colonial Records of North Carolina, volume III, page 68.

sistent with the laws of the Province, was declared to be in force in North Carolina, and this was again enacted under the royal government. The polity of the Province was practically full formed before the crown purchase, and we need to consider only the more important modifications that were made between 1729 and 1776.

The instructions sent over to the royal Governors are interesting and important. In many respects they are admirable, expressing for that time, the most enlightened opinions of English laws and institutions.

A prudent writer will not attempt a detailed account of the court system of this period, the general features, however, are distinct enough. The Court of Chancery was composed of the Governor and at least five members of the Council, and from its decisions there was an appeal to the King and his Privy Council.[19]

The Province was divided into a number of districts, in each of which the Superior Court, usually was held twice a year by the Chief Justice and an Associate Justice or by either of them.[20]

While the Superior Court was the common law court, it had also equity jurisdiction to an extent which varied at different periods. There was a County Court composed of the Justices of the Peace which was held four times a year in each county. It had a

[19]Raper's North Carolina, pages 150-151; Moore's History of North Carolina, volume I, page 143.

[20]Moore's History of North Carolina, volume I, page 143.

limited law and equity jurisdiction together with many administrative functions.

The court laws were constantly changed under the royal government, and were the cause of much popular discontent and of frequent controversies between the Governor and the Legislature. These controversies culminated in 1773, in the practical abolition of the court system.

The most important change affecting the legislative department, was that members of the lower house should serve until the dissolution of the Assembly.

The first State Constitution was framed by the Congress which met at Halifax, November 12, 1776, and completed its labors on the 18th of the ensuing December. Under it the legislative power was vested in a General Assembly, composed of a Senate and a House of Commons. Members of both houses were chosen annually, each county electing a Senator and two Representatives, and six of the larger towns, each, one member of the lower house. Eligibility to the Senate was conditioned on one year's residence in the county, and on the ownership of three hundred acres of land in fee. The same term of residence was required of members of the House, but the property qualification was one hundred acres in fee, or for life, acquired as much as six months before the election. Electors of senators were freemen, owning a freehold of fifty acres, and of representatives, all free-

men paying taxes, and twelve months residence was required of electors of both classes.

Each house elected its own officers, and judged the election and qualification of its members. Bills were required to be read three times in each house. All Judges and Attorneys General were elected by joint ballot of the two houses, and were commissioned by the Governor to hold office during good behavior.

The two houses also elected at their first meeting after each annual election, a Governor, who could not serve more than three years in six, and who was required to have resided in the State over five years, and to own therein, a freehold in lands and tenements exceeding a thousand pounds in value. Along with the Governor, was elected the Council of State already referred to, composed of seven persons and charged with the duty of aiding the Governor in the administration of his office. The Governor was authorized, with the consent of the Council, to grant pardons, to fill vacancies temporarily, and to lay embargoes.

In the case of vacancy in the office of Governor, the succession was first, to the Speaker of the Senate, and then to the Speaker of the House of Commons. The Assembly elected a Treasurer or Treasurers, annually. No receiver of public moneys could be elected to any office until he should have accounted fully, for all moneys collected by him. Clergymen were ineligible to the Assembly, and it was declared that, "no person who shall deny the being of God, or the truth of the

Protestant religion, or the divine authority of the Old or New Testament or who shall hold religious principles incompatible with the freedom and safety of the State," should hold any civil office. It was ordained that there should be no church establishment, and no church tax. Imprisonment for debt was allowed, but except in cases affording a strong presumption of fraud, the debtor was to be released on surrendering all his estate to his creditors. Foreigners might acquire lands, after taking an oath of allegiance, and after one year's residence, were to be deemed citizens. Schools were to be established and teachers to be paid from the public treasury, and useful learning was to be promoted in one or more universities. Entails were permitted, but were to be regulated so as to prevent perpetuities. A significant declaration in the Bill of Rights, was that nothing therein should be, "construed so as to prevent the establishment of one or more governments westward of this State, by consent of the Legislature."

In 1777, the Legislature revised the laws regulating the courts, continuing the division of the State into districts, and retaining the Superior Court with original jurisdiction in civil cases above certain amounts, and appellate jurisdiction in cases begun in inferior courts.

This Court was held by one or more of the three Judges who were provided for, by the Act of 1778, but while the old system was thus generally followed

there was no provision for a Supreme Court of Appeals. This condition continued until 1799, and the name "Supreme Court" does not appear in the legislation of North Carolina until 1805.[21]

The Justices of the Peace held the courts of pleas and quarter sessions, which had a much larger jurisdiction than in later times, extending to nearly all matters triable in the circuit and criminal courts of Tennessee.

The counties were divided into districts, each to have at least one Justice of the Peace. In 1778, the State Legislature re-enacted the whole body of the common law, so far as it was consistent with the laws of the State. In 1782, equity jurisdiction, was conferred on the Superior Courts, and this act is the basis of the existing equity jurisprudence of Tennessee.[22]

There seems to have been no distinct court of chancery in North Carolina from 1776 to 1782, although the Constitution of 1776 provided for courts of equity. The Act of 1782 conferred upon the Superior Court the jurisdiction of the English Court of Chancery, and in addition made the Chancery Court a court of record.[23]

It will be seen that this Superior Court, with its common law and equity jurisdiction, was adopted and used for many years, by the State of Tennessee.

The institutions of the State of North Carolina, as

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[21]"Transition of North Carolina from Colony to Commonwealth," by E. W. Sikes, pages 76-77 and notes.
[22]Acts of North Carolina, 1782, chapter XI, section 1.
[23]Acts of North Carolina, 1782, chapter XI, section 1.

here briefly outlined existed in 1789, when Tennessee was formally ceded to the United States, and from them have been developed the existing institutions of Tennessee, in orderly and conservative process, without a break, and without radical innovation at any point.

In the year 1715, the Legislature of North Carolina declared that the "laws of England are the law of this government in so far as they are compatible with our way of living," and this statement is hardly less applicable to Tennessee, now, than it was to North Carolina, two hundred years ago.

CHAPTER V.

TERRITORIAL GOVERNMENT.

1790-1796.

The Territory of the United States South of the River Ohio, was treated as embracing only the North Carolina cession of 1789, although the Federal government might have claimed the ownership of a strip of land twelve miles wide and four hundred miles long, contiguous to the present State of Tennessee on the south, and extending from the western line of South Carolina, or the "dividing mountains," to the Mississippi River, which had been ceded by South Carolina to the Confederation in 1787.

By the terms of the compact between the United States and the State of North Carolina, the inhabitants of the "Southwest Territory," as it came to be called, were entitled to all the advantages and privileges provided by the Ordinance of 1787 for the government of the Northwest Territory, and by an Act of Congress passed May 26, 1790, the form of government set out in that Ordinance was extended to the new territory. This placed the two Territories on the same footing in all material respects, except that the North Carolina Act and deed of cession, as accepted and ap-

proved by the United States contained this important clause: "that no regulations made or to be made by Congress shall tend to emancipate slaves." [1]

The organization thus provided for by the Ordinance of the Congress of the Confederation in 1787, as amended by an Act of the Federal Congress, approved August 7, 1789, included a Governor to serve three years, a Secretary to serve four years, and three Judges to serve during good behavior. Until the organization of a General Assembly the Governor and the Judges were empowered to adopt such laws as might be necessary, and the Governor was authorized to appoint the civil officers for each County and to establish proper governmental districts in the Territory.

So soon as there should be 5,000 free male inhabitants, of full age, a Legislature was to be chosen upon the basis of one representative for every 500 voters, until there should be twenty-five representatives, after which the Legislature might re-adjust the basis of representation. The General Assembly was to consist of the Governor, the House of Representatives, and a Legislative Council of five members. These last were to be commissioned by the President from a list of ten nominated by the territorial House of Representatives. When the Territory should have 60,000 free white inhabitants, it was entitled to become a

[1] Poore's Charters and Constitutions, volume II, page 1666.

State, and it would seem that under the Ordinance of 1787, it might have been admitted to statehood, in the discretion of Congress, before attaining that population. The military organization was in the hands of the territorial government, except that all general officers were commissioned by the President of the United States. This form of government was in effect in the Territory South of the Ohio, throughout its existence. William Blount was appointed Governor, and qualified September 20, 1790. Daniel Smith was Secretary, and David Campbell, John McNairy, and Joseph Anderson, Judges, John Sevier, Brigadier General for Washington District, and James Robertson for Mero District. The Legislature of North Carolina, before the cession, had divided the "western lands" into two judicial districts: Washington District, which included the counties then organized in what is now East Tennessee, and Mero District, embracing the three Cumberland counties then in existence. This division was retained at first by Governor Blount, who made Washington and Mero also military districts, but in 1793 he created the additional judicial district of Hamilton, composed of the counties of Knox and Jefferson in East Tennessee, without affecting the existing military arrangement.[2]

The territorial laws, before the establishment of the Legislature, will be found to include two classes: the "Ordinances" of the Governor, and the "Acts" of the

[2]Laws of Tennessee, Scott's Edition, volume I, page 454.

Governor and Judges, in pursuance of the division of the powers made in the Ordinance of 1787.

In 1793, the Governor was able to certify that the Territory contained 5,000 voters, and therefore was entitled to a General Assembly. Accordingly, in December of that year, a House of Representatives was elected, and on the 24th day of February, 1794, met at Knoxville. At this meeting the representatives nominated the ten men from whom the President of the United States was now to choose the Legislative Council. The other proceedings were characteristic of the time and of the people. The House of Representatives heard a sermon, petitioned Congress for protection from the Indians, and then adjourned, or was prorogued, until August 24th, when the General Assembly met in regular session. It held a special session beginning in June, 1795, and was the only General Assembly of the Territory. The Legislative Council chosen by the President consisted of Griffith Rutherford, John Sevier, James Winchester, Stockley Donelson, and Parmenas Taylor. The House of Representatives had thirteen members, of whom John Tipton, William Cocke, Joseph McMinn, and James White, of Davidson County, are the best known.

Until the meeting of the Assembly, the statutes of North Carolina, and the common law, so frequently adopted by that State, remained in effect and unchanged in the Territory, the cession Act having pro-

vided for their continuance until repealed or altered by the "legislative authority" of the Territory.

The first Act of the General Assembly in regular session was a revision of the North Carolina judiciary Act of 1777, and its amendments, so as to adapt them to the condition and needs of the Territory. Very few changes were made, and none of importance, and the court system of the mother State was thus continued, and was in operation when Tennessee became a State. Evidences of a spirit of cautious progress may be found in the territorial Act. For instance, the North Carolina Act provided that "all negroes, mulattoes, Indians, and all persons of mixed blood descended from Negro or Indian ancestry, to the fourth generation inclusive, (though one ancestor of each generation may have been a white person), whether bond or free, shall be deemed and taken to be incapable in law to be a witness in any case whatsoever except against each other." [3]

The territorial government was liberal enough to curtail this disability by one generation, but was also conservative enough to add that no person of mixed blood in any degree should be admitted as a witness against a white person, within twelve months after being liberated.[4]

The Act of 1794 was carefully framed to avoid the repeal of any statute of North Carolina "bottomed"

[3]Acts of North Carolina, 1777, November Session, chapter II, section 42.

[4]Laws of Tennessee, Scott's Edition, volume I, page 471.

on the Act of 1777, and it specifically declared that among the Acts thus "bottomed" was the one which gave equity jurisdiction to the superior courts of law.

The greater part of the territorial legislation was fiscal and educational. The first tax law is interesting in itself, and in relation to the tax clauses of the constitution of 1796. The subjects of taxation were, all lands held by deed or entry within the treaty lines, free males and male servants between the ages of twenty-one and fifty years, slaves, male and female, between the ages of ten and fifty years, stud horses and town lots. All lands were taxed by the hundred acres, and in proportion for a greater or less quantity, and were assessed at twenty-five cents on the one hundred acres. White polls were rated at twenty-five cents, negro polls at fifty cents, stud horses over three years of age at four dollars, and town lots at one dollar each.[5]

By a later Act these assessments were reduced uniformly fifty per cent.[6]

The beginnings of the treasury department are to be found in chapter 9 of the Acts of the regular session of the Territorial Legislature providing for the appointment by the Governor of one Treasurer for Washington and Hamilton Districts, and another for Mero District. Another Act empowered county courts to levy taxes for the purpose of building or

[5]Laws of Tennessee, Scott's Edition, volume I, page 489.
[6]Laws of Tennessee, Scott's Edition, volume I, page 510.

repairing court houses, prisons, and stocks, while an early piece of special legislation authorized a lottery in Mero District for raising money to build a jail and stocks at Nashville.

The educational legislation is interesting, and highly creditable to the Assembly. The following colleges were incorporated: Greeneville College in September, 1794; Blount College near Knoxville, in the same month, one week later, and Washington College, at Salem, in Washington County, July 8, 1795.

Blount College is believed to have been the first purely nonsectarian institution of higher learning in the United States, and was one of the first, if not the first to admit women students.[7]

Washington College was a continuation and expansion of Martin Academy, founded by Samuel Doak, chartered by North Carolina in 1783, and rechartered by the State of Franklin.

Blount College was the germ of the present University of Tennessee. Greeneville College still exists as Greeneville and Tusculum College, while Washington continues a career of usefulness under its original name. The incorporators of these institutions were the foremost men of the Territory, and it is to be noticed as an indication of social and religious conditions, that at the head of each of them was a Presbyterian preacher. The Reverend Samuel Doak, first

[7] "Blount College and the University of Tennessee," by E. T. Sanford, page 23.

President of Washington College, is justly regarded as the father of education in Tennessee. He was a man of piety, learning, and sincere patriotism. Martin Academy was the first institution of learning, in the Mississippi Valley, and its founder was not merely a teacher and a preacher, but also was interested actively in public affairs. It was he who invoked the Divine blessing upon the heroes of King's Mountain, as they left their place of assembling at Sycamore Shoals. The name of Balch stands high in the list of patriots and of pioneers of education in North Carolina and Tennessee. It will be remembered that Hezekiah Balch, first President of Greeneville College, was one of the opponents of the Houston Constitution before the Convention of the State of Franklin. Samuel Carrick, president of Blount College, had all the good and strong qualities of his race and class, the Scotch-Irish Presbyterian preachers, and history and tradition unite in commending his virtues, wisdom, patriotism, and courage.

In Middle Tennessee or the Cumberland settlements, no less regard for education had been shown. In December, 1785, James Robertson and others secured the passage of a bill by the Legislature of North Carolina establishing Davidson Academy at Nashville, and at the first meeting of the trustees of that institution in August, 1786, the Reverend Thomas B. Craighead, a Presbyterian minister was elected President. This institution became Cumberland College in 1807,

and the University of Nashville in 1826, under which name it still exists, and seems to be at the beginning of a period of great success and usefulness.

These were not public schools, but all conditions in the Territory, physical as well as financial, made free schools impossible, at that time, and while these were called Colleges, they were at first hardly more than primary schools, though Blount and Cumberland aspired after a while to the full quality of the old fashioned classical college, and all of them advanced their standards as general conditions in the State improved.

To the Territorial Legislature belongs the credit of establishing the office of public printer by an Act introduced by John Sevier, September 25, 1794.

We have seen that the Bill of Rights of the North Carolina Constitution of 1776 contemplated the creation of at least one new state beyond the Alleghanies and that the settlers in the Valley of East Tennessee were eager for the formation of such a state as early as 1784. The majority of the people of the Southwest Territory, especially the friends of Governor Blount and General Sevier, were now manifestly impatient for statehood. The popularity of William Blount, which seems to have increased steadily, and which was unaffected even by his expulsion from the United States senate after the admission of Tennessee into the Union, must be attributed largely to his position on this question. The East Tennessee leaders were

in favor of statehood, and probably not entirely from unselfish motives. The frontier people as a rule seem to have believed that self government would be a panacea for the ills of which they complained, and a guaranty of prosperity.

When the proposition to apply for admission to the Union was submitted to the people, more than two-thirds of the vote of East Tennessee was in the affirmative, but in the Cumberland counties the reverse was true. The reasons for this difference are not quite clear, and but little profit can be derived from considering them. Doubtless the distance by which the eastern and western settlements were separated, and apparent diversities of interest, prevented sympathy and even suggested competition. The Cumberland settlements did not actively support the Franklin movement, and no doubt, in 1795, their leaders realized that if a State were formed, their ambitions would be postponed to those of their rivals in the more populous settlements east of the mountains. It was apparent also, that for a time at least, the capital of the new state would be in the east. As Mr. Jefferson's Ordinance of 1784, if made effective, would have placed East Tennessee and the Cumberland settlements in different states, it may be, that Robertson and his associates were influenced by that fact at the time of the Franklin movement, but it is much less probable that this was true in 1795.

Mr. Albert V. Goodpasture, an excellent authority upon all phases of Tennessee history says that the opposition in the Cumberland settlements "grew out of the question concerning the navigation of the Mississippi River." He adds: "As it appeared to the Cumberland settlements, their country was hardly worth the privations, toil and suffering it had cost to win it, if the claim of the Spanish government to the exclusive right to navigate the Mississippi River was to be tolerated. And only less monstrous than the Spanish claim itself was its proposed concession for a period of twenty years, in the treaty negotiated by Mr. Jay." [8]

The opposition in East Tennessee was not serious but is even more difficult to explain. The section of the Constitution of 1796 demanding the free navigation of the Mississippi, was drawn and presented by William Blount, and doubtless expressed the sentiments of East Tennessee, as well as of Cumberland, on the subject, and it may be assumed that the feeling referred to by Goodpasture existed to some extent even in the Holston Valley. It has been suggested that the opposition as a whole was a protest against the policy of the Federal government upon the subject of the navigation of the Mississippi.

When the Territorial Legislature met it seems to have been dominated by the purpose of securing the admission of the Territory into the Union. Early in

[8] American Historical Magazine, volume I, page 212.

the session of 1794, the House of Representatives passed a resolution requesting the Governor to have a second census taken, and at the end of that session, passed another for taking the will of the people upon the subject of statehood. Governor Blount, though in cordial sympathy with the House of Representatives, did not know how to proceed, as up to that time no territory belonging to the United States had been admitted to the Union. It is said that he consulted with Dr. James White, the territorial delegate to Congress, and upon his advice decided that the proper plan was to call a Convention to frame a Constitution to take effect as soon as Congress should have passed the Act of admission.[9]

Thereupon the General Assembly was convoked in extra session on the last Monday in June, 1795, and passed an Act ordering a census, and providing that if the enumeration should disclose the specified population, the Governor should call a Constitutional Convention, and as the Ordinance of 1787 appeared to authorize Congress, at its discretion, to admit a State with a smaller population, the enumerators were instructed to find whether or not the people desired to apply for admission to the Union with a population of less than 60,000. The census developed the fact that the Territory contained 65,676 free whites, 973 free negroes, and 10,613 slaves. The Governor promptly

[9]Garrett and Goodpasture's History of Tennessee, page 123.

issued a call for a Constitutional Convention to meet at Knoxville, on the 11th of January, 1796, announcing at the same time that the territorial government would remain in operation until the new Constitution should go into effect upon the official publication of that instrument. Meeting pursuant to the Governor's proclamation, on the 11th of January, 1796, the Convention adopted a Constitution which was treated as effective without being submitted to the people of the Territory. William Blount, President of the Convention, was directed to transmit a copy of the Constitution to the Secretary of State for the United States, and it was ordained that when the General Assembly should meet on the 28th of March, 1796, the territorial government should be at an end. The Secretary of State received this communication on the 28th day of February, but President Washington did not send the copy of the Constitution to Congress until the 8th of April, after the State government had gone into active operation. Meanwhile, Governor Blount had accepted the office of United States Senator, and John Sevier of the Legislative Council, had been elected Governor of the State of Tennessee. These proceedings have been described by a Tennessee lawyer as "breaking into the Union."

Party opposition, presenting many technical objections, delayed the admission of the State two months. The Federalist leaders anticipated that the new State would give its electoral vote to the democratic or

republican party, and it is probable that this was the real cause of the vigorous opposition which was made by them, and especially in the Senate, although it must be admitted that the objections which they presented were not without force. In the House of Representatives, the opposition was not persistent, and that body seems to have taken the view that prevailed in Tennessee, which was, that the Territory having attained the necessary population, was entitled to statehood, upon application to Congress, by virtue of the terms of agreement between the United States and the State of North Carolina. In the Senate the opposition was vigorous and sustained, and that body on the 26th of May, passed a bill by a vote of fifteen to eight, creating a State out of the territory ceded by North Carolina to the United States, and requiring an enumeration of its inhabitants, but on the 31st of May, it accepted the view of the subject which had been approved by the House of Representatives, and the house bill became a law, and was approved by President Washington on the first day of June, 1796. Thus was accomplished the long postponed desire of Sevier and his supporters, and Tennessee became the sixteenth State in the American Union.

The proceedings of Congress in this matter are interesting, and furnish some important information in regard to affairs in Tennessee. The report of the Senate committee calls attention to the South Carolina cession of 1787, and bases an objection to the bill on

the fact that the North Carolina cession did not embrace all the territory of the United States south of the Ohio, but despite that fact, it recommends that the entire North Carolina cession be laid out into one State by Congress, and that a census be taken by Federal authority. This last was in pursuance of the argument which was strenuously urged in both houses, that the State must be created by Congress before it could be admitted into the Union.[10]

It was said that this was required by the law, and that the method that had been adopted did not show proper respect for the United States.[11]

Albert Gallatin was of opinion that when the Territory arrived at a free population of 60,000, it became *ipso facto,* a state.[12]

The right of the territorial government to take the census was denied, but in reply it was said, aptly, that when the General Assembly had been authorized, in 1794, and the Legislative Council appointed by the President, a census taken by the same authority had been accepted as the sole basis of the proceeding. As an additional estoppel upon Congress to deny the validity of the proceedings, it was said, not very forcibly, that Governor Blount had kept the state department fully informed of every step that had been taken toward the formation of a Constitution. The

[10]Annals of Congress, 1795-6, pages 93-94.
[11]Annals of Congress, 1795-6, page 1304.
[12]Annals of Congress, 1795-6, page 1320.

opponents of the bill attacked not only the right of the territorial government to take the census, but also the method by which it had been taken. They declared that the period of the year which had been selected, extending from September 15th to November 15th, was the time of greatest migration upon the frontier, and afforded therefore, opportunity for enumerating many persons who were only temporarily in the Territory; that fixing the compensation of the enumerators upon a *per capita* basis offered a temptation, if not a reward for false returns; that in any event the time was unduly long; and that only the free inhabitants should have been numbered.

The fact that the population of Tennessee was large enough to entitle her to two members of the lower house of Congress, and that the Legislature had already provided for two representatives, figured largely in the debate, but in both houses it was held that as the representation of the existing States was upon the basis of population in 1790, Tennessee should, until the next Federal census, have only one representative.

The proposed Constitution, was attacked principally, because, as alleged, certain of the provisions were not in accord with those of the Ordinance of 1787, or assumed for the State, powers that belonged to Congress. Among the provisions assailed was section 29 of the Bill of Rights, which had been drafted by William Blount, and which declared: "that an equal

participation in the free navigation of the Mississippi is one of the inherent rights of the citizens of this State; it cannot therefore be conceded to any prince, potentate, power, person or persons whatever."

This highly alliterative declaration may have been somewhat presumptuous but there can be no doubt that it expressed accurately the feeling of the people of Tennessee, and of all the Mississippi Valley. Another criticism of the Constitution was that there was no limit upon the power of the Legislature, and this charge, while it seems to have been gratuitous and irrelevant in the debate, was, as we shall see, well founded in fact, and pointed out, though in excessive terms, one of the chief defects of the instrument.

The delay in admitting the State, the necessity of re-electing Senators, and the loss of a member of Congress, irritated the people of Tennessee, and no doubt their sentiments were expressed in the letter by which William Cocke accepted his second election to the Senate. Mr. Cocke wrote: "I cannot help mentioning to you, I feel the deepest concern to see our dearest rights invaded by the supreme legislature of the nation. We are, by them made subject to the payment of taxes, while we have been unjustly deprived of representation. * * * I hope our opponents in the Senate of the United States will be unable to find another quibble." [13]

The territorial government in itself is of no im-

[13]Ramsey's Annals of Tennessee, page 674.

portance in the institutional history of Tennessee. Its legislation is of interest because it is the beginning of independent law making in Tennessee, containing the earliest timid departures from the jurisprudence and methods of the mother State. These departures were wholly unimportant, and permitted the entire body of the law of North Carolina, and also its institutions to pass unchanged to the new State of Tennessee.

The Territorial Governor is worthy of our respectful consideration. His intellect was not of the highest order, but he was an able man, and, for the time, highly accomplished, as well educated as any of his own generation, among his associates, except, perhaps, the scholarly Roane. In conduct, he was inferior to none, not even to Sevier, whom he seems to have equalled in popularity. For a tactful, efficient, and popular administration of the affairs of the Territory, and especially for successful management of the Indians, no better selection could have been made. His success is the more remarkable, when we consider that, not only were the people exceptionally independent and self assertive, but, in the main, were of limited means, and culture, and the natural enemies of the luxury and of the aristocracy of which the Governor was representative. The policy of the Federal government toward the Indians was unpopular to the last degree, but the Governor was at once faithful to his trust as Indian agent, and acceptable to the people. Attention has been called to the fact that Blount's popularity

was not impaired even by his expulsion from the United States Senate. After his trouble in that body, he was elected speaker of the State Senate of Tennessee, a position held by General James White, who resigned in order that Blount might receive this mark of public approval and confidence.

As Governor of the Territory, his powers were almost autocratic, but his sagacity was unfailing and his tact unequalled. Aristocrat as he was, he possessed the power of attracting the roughest of the backwoodsmen who formed so large a part of the population of the Territory, while the more cultured class took him as their model, recognizing his superiority, without envy.

The historian, Ramsey, whose services as an investigator and compiler are above praise, derived the utmost satisfaction from the contemplation and the description of this courtly gentlemen, and the environment which he created for himself. He writes as follows:

"Governor Blount, in the reception of a liberal salary from the United States treasury, and from the resources of an ample private fortune, had been able to indulge his disposition to entertain freely and even elegantly. The style of his receptions was, necessarily, below that of Philadelphia and Wilmington, but it was from the condition of things, scarcely less expensive to the liberal host, who, in the infancy of society around and in Knoxville, left no means un-

employed to manifest a hospitality at once worthy of the chief magistrate, and creditable to the gentleman. The older citizens still refer to the last years of the Territorial Government, as furnishing models of refinement and etiquette, of gentility and polish, seldom seen in a new community. Not the upstart consequence, and assumed superiority of suddenly acquired wealth and unexpected promotion; but the genuine politeness, ease, grace and cordiality, the result and accompaniment of innate good feelings, sterling worth, and admitted respectability. The Court of Governor Blount was thronged by strangers and gentlemen, visiting the seat of government from all parts of the Union on business, or for curiosity and pleasure. Levees and entertainments became frequent and crowded. There was wanting, of course, the Parisian saloon, the servants in livery, and all the exterior of a princely munificent entertainment. But then, there was what is far better, the cordiality and the absence of ceremony, and the warm-hearted and brotherly greeting, without which, all the attractions of conviviality are empty and valueless." [14]

If due allowance be made for the affectionate enthusiasm and pride of the annalist, there is still no reason to doubt, the essential accuracy of his description of the "Court of Governor Blount."

Elsewhere, he has celebrated adequately the graces and the virtues of the Governor's wife, Mary Grainger

[14]Ramsey's Annals of Tennessee, pages 645-646.

Blount, who was not less admired and praised than her husband, by her contemporaries. The qualities of William Blount become more attractive as they are better understood, but it remains true that his purposes and his conduct in the unfortunate affair which resulted in his expulsion from the Senate, have never been explained, satisfactorily, and that history, especially as written in Tennessee, has dealt with him very kindly. These references to him are justified by the fact, that for four years he was practically the government of the Territory, and was to the end, its most conspicuous and potential citizen, its social, as well as its political head.

The official records of the time show beyond question that the leaders in the Territory were well, and somewhat elaborately mannered. The communications between the different branches of the government are models of deferential but dignified courtesy, and no worthy act of one of them was allowed to go unpraised by the others. Along with a genuine dignity and courtesy, these old records disclose as other characteristics of the people, reverence for sacred things, a high sense of honor and justice, and a frugality which conditions made unavoidable, but which never descended to meanness.

Looking further to general conditions at the time of the adoption of the Constitution, it will be remembered that eleven counties had been established, Washington, Greene, Sullivan, Hawkins, Jefferson, Blount,

Knox and Sevier, in East Tennessee and Davidson, Tennessee and Sumner in Middle Tennessee, the population of Middle Tennessee being 11,924, and of East Tennessee, 65,338. Of the 10,613 slaves, 2,466 were in Middle Tennessee, and 8,147, in East Tennessee, it appearing thus that the ratio of slaves to whites was already much larger in Middle Tennessee than in East Tennessee, the negroes constituting more than twenty per cent of the population in Middle Tennessee, and about thirteen per cent in East Tennessee. This would indicate a higher average of property in Middle than in East Tennessee.

A fact even more suggestive than this, of the difference between the two sections on the negro question is, that of the 973 free negroes included in the census of 1795, only twenty-six were in Middle Tennessee, and only one in Sumner County, which had a population of 6,370. It would hardly be safe to base a generalization upon these facts, but it is interesting to find Middle Tennessee at so early a period, with the larger percentage of slave population, and practically without free negroes. The force of the last fact is largely diminished, however, when we consider the timidity of the negroes, the remoteness of the Middle Tennessee settlements, the long and dangerous journey to them, and the incessant warfare with the Indians in which they were engaged.

The expenses of the government to be paid out of the treasury of the Territory for the year 1794, were

estimated in advance at $2,390.00. In April, 1796, Howell Tatum, reported the amount of money received by him as Treasurer of Mero District, to March 18, 1796, at $4,900.37-5-16, and Landon Carter reported the amount received by him as Treasurer of Washington and Hamilton Districts to April 16, 1796, at $6,380.63.[15]

It is assumed that these reports covered all the transactions of the two Treasurers from their appointment in the fall of 1794, to the dates named in the reports, although there is no specific statement that such is the fact.

We have examined now, the history of Watauga, of Cumberland, of Franklin, and of the Southwest Territory, and have seen that at Clarksville, on the Cumberland, in 1785, and in the French Broad country in 1788, small communities became, for a time, self governing. Of the five Tennessee republics that preceded the establishment of the Territory, Cumberland alone had any direct connection with a land company, and this was a business association, not political. Watauga paid a part of the expenses of the Henderson treaty at Sycamore Shoals in 1775, but had no other connection with the Transylvania Company.[16]

In their political aspect all these movements were essentially, indeed exclusively, popular, in origin and conduct. The Tennessee settlers were always ahead

[15]Journal of Tennessee Senate, 1796, page 46.
[16]Calendar of Virginia State Papers, volume I, page 292.

of the government, wresting the country from the Indians by their own unaided prowess. When they advanced too far, and when they were abandoned or neglected by the State of North Carolina, and needed civil government, they drew upon their own resources. No St. Clair met defeat, and no Wayne triumphed over the savages, to clear the way for them. They were their own army. The whole Appalachian region belonged to the frontiersmen by right of conquest. It does not need to be said that such men were brave, self reliant, independent. They were the first comers, and were followed, fortunately, by a great company of revolutionary soldiers, to whom North Carolina gave her western lands in tardy payment for their services. Remembering that Tennessee was thus peopled, we shall not be surprised to find that in the life of the next generation, the State became the leader of the democratic movement which finally established the power of the common people in this country.

Another peculiarity of the way in which Tennessee was settled and was treated by the Federal government produced unfortunate results. By the Ordinance of 1785, the Congress of the Confederation ordered that the public lands of the Northwest Territory be surveyed, and divided into townships six miles square, containing each, thirty-six lots one mile square, one of which in each township was to be reserved for the maintenance of public schools. This system resulted in benefits that are incalculable. In addition to the

support it has given to education it furnished a natural unit of government.

The plan was never carried out in the Southwest Territory. In 1806, the United States, Tennessee and North Carolina entered into an agreement as to public lands in Tennessee, in which Congress ceded to Tennessee all lands east of a certain line, amounting to about two-thirds of the State, upon the condition, among others, that the State in issuing grants and perfecting titles should set apart 640 acres to every six miles square for the use of public schools. It was estimated that under this provision the State was entitled to 444,444 acres in the territory thus ceded to it, for school purposes, but the best authorities assert that the lands fit for cultivation and improvement had been taken up to such an extent that only 22,705 acres of school lands could be located.[17]

An appeal to Congress to make good the deficiency from the unoccupied lands reserved to the United States in 1806 was unavailing. Tennessee received in school lands, from the territory referred to, about five per cent of the amount that the people of the Northwest Territory received from an equal area. Thus, unlike other States created from territory of the United States, Tennessee was compelled, in the matter of public education, to rely almost entirely

[17] American State Papers, Public Lands, volume V, page 381; Garrett and Goodpasture's History of Tennessee, page 154.

upon its own resources. This has been true as to everything else, but the obvious injustice, or at least inequality, which has been pointed out, was not without compensation in the increased self reliance and independence of the people.

CHAPTER VI.

THE CONSTITUTION OF 1796.

1796-1835.

The first Constitutional Convention of Tennessee, composed of five members from each of the eleven counties of the Territory, met in the village of Knoxville in the office of David Henley, agent of the war department of the United States, on the 11th day of January, 1796. The building had been equipped for the purposes of the Convention at a cost of twelve dollars and sixty-two cents, of which ten dollars was for seats for the members, and two dollars and sixty-two cents for three and one-half yards of oil-cloth. Among the fifty-five members were a number of men who afterward played important parts in state and federal affairs. At the head of the delegation from Davidson county was John McNairy, one of the Judges of the territorial court who became United States District Judge after the creation of the State. From the same county came James Robertson, of whom nothing more need be said here. Another member from that county who was destined to attain a higher renown and accomplish greater things than any of his associates, was Andrew Jackson, a young lawyer practicing at Nashville, by whom, according to

tradition, the name of Tennessee was suggested for the new State. Jackson had an active and influential part in the Convention, giving evidence of the powers which afterwards made him the foremost man in the Republic and probably the greatest leader of men that it has ever produced. Hawkins county sent two men of note, Joseph McMinn, afterwards Governor of Tennessee, and William Cocke, one of the Franklin leaders, one of the founders of the Transylvania Republic, twice a Senator of the United States from Tennessee, a leader in the Mississippi Territory and a patriot distinguished for loyalty and service in both our wars with England. Among the delegates from Jefferson county were Alexander Outlaw, who became one of the foremost citizens of the new State, and Joseph Anderson, one of the territorial Judges, for sixteen years United States Senator, and then Comptroller of the Treasury of the United States; a soldier in the war for independence, and afterwards as a Senator, one of the most earnest advocates of the war of 1812. From Knox County were William Blount, Governor of the Territory, and the "first gentleman" west of the mountains; James White, the founder of Knoxville, and Charles McClung. From Sullivan county came W. C. C. Claiborne, who was afterwards a Judge of the Superior Court of the State, the successor of Andrew Jackson in Congress, first Governor of the Territory of Mississippi, Governor of Louisiana and Senator elect from that State at the time of his

death; and John Rhea, who was for eighteen years a member of Congress. Most prominent among the delegates from Washington county, were Landon Carter, son of John Carter of Watauga, Secretary of the State of Franklin, and Speaker of its Senate, and the father of William B. Carter, President of the Constitutional Convention of 1834; and John Tipton. Daniel Smith, Secretary of the territorial government, and afterwards United States Senator, was one of the delegates from Sumner county. Neither John Sevier, nor any other member of the Legislative Council of the Territory was a delegate.

The Convention, having assembled, was, on the motion of James White, of Knox county, opened not only with prayer, but also a sermon by the Reverend Samuel Carrick, and there is no reason to suppose that these religious exercises were as brief as those that have excited the applause of modern political conventions. William Blount, having been elected President, and William Maclin Secretary, the Convention adopted rules, and then resolved: "That economy is an amiable trait in any government, and that in fixing the salaries of the officers thereof, the situation and the resources of the country should be attended to." It is indisputable that this "amiable trait," has been conspicuous, continuously, in the history of Tennessee. In sincere pursuance of this resolution, the members of the Convention having been allowed compensation at the rate of two dollars and fifty cents a

day, agreed to accept only one dollar and fifty cents, and made a corresponding reduction of their mileage.

The first important action was the appointment of a committee of twenty-two to draft a Constitution. This committee was composed of Daniel Smith, Chairman, David Craig, Joseph Black, Andrew Jackson, John McNairy, Samuel Frazier, William Rankin, William Cocke, Thomas Henderson, Joseph Anderson, James Roddye, William Blount, Charles McClung, W. C. C. Claiborne, John Rhea, David Shelby, Samuel Wear, John Clack, Thomas Johnston, William Fort, John Tipton, and James Stuart.[1]

Charles McClung, being a clerkly man, appears to have formulated the original draft of the Constitution. The Convention manifested prudence and intelligence by the method which it pursued in preparing the Constitution. The Constitution of North Carolina, adopted in 1776, was for that time a well devised and sufficiently democratic instrument. The state of Franklin had retained it rejecting the incongruous and empirical amendments proposed by Mr. Houston and his associates; the original instrument had been effective west of the mountains from 1776 to 1784, and from 1788 to 1790, and had been really the organic law of the Territory. It was entirely natural and right therefore, that the Convention of 1796, should content itself with reaffirming, in the main, the Constitution which was in a very real sense, the law of the land at that

[1]Journal, Convention of 1796, pages 5-6

time. All the existing institutions of the Territory harmonized with it, and wisdom and prudence suggested its retention with such amendments as slightly changed conditions required. The preamble of the Constitution of 1796 recites that it is ordained and established by the people of the Territory of the United States South of the River Ohio, having the "right of admission into the general government as a member State thereof, consistent with the Constitution of the United States, and of the Act of cession of the state of North Carolina, recognizing the Ordinance for the government of the Territory of the United States Northwest of the River Ohio." This declaration is conceived in a spirit sufficiently independent, but the concluding clause of the preamble is almost defiant, declaring that the people had mutually agreed with each other to form a free and independent State." "Free and independent" were conventional words, then as now, but while used, as in this clause of the preamble, they would now indicate freedom and independence under the Federal Constitution, there is reason to believe that a large number of the Tennesseans of 1796 would have been in favor of giving them a literal construction if Congress had refused to admit the State into the Union, although it is not probable that the sentiment would have prevailed.

The preamble is remarkable as a concise and forcible statement of the argument for the admission of the State and the correctness of the position adopted

by the Convention. We have seen that this view of the law of the case was approved by the Federal House of Representatives, and finally accepted, though reluctantly, by the Senate. It appears also to have had the approval of President Washington, who in his letter transmitting the Constitution to congress said, "Among the privileges, benefits and advantages thus secured to the inhabitants of the Territory South of the River Ohio, appear to be the right of forming a permanent Constitution and state government, and of admission as a State, by its delegates, in the Congress of the United States, on an equal footing with the original States, in all respects whatever, when it should have therein 60,000 free inhabitants." [2]

The first place in the body of the Constitution is given to the General Assembly, and the re-adjustment of this part of the Constitution of North Carolina was the Convention's most difficult work. It has been shown in a preceding chapter that the Legislature of North Carolina was composed of a Senate and a House of Commons, each county choosing one member of the Senate and two members of the House of Commons, while borough representation was extended to six towns. The term of members of both houses was one year, the residence qualification of Senators, one year in the county, and the property qualification not less than three hundred acres of land in fee in the county. The residence qualification of members of the House

[2]Ramsey's Annals of Tennessee, page 670.

of Commons was one year in the county, and the property qualification, the ownership for six months of one hundred acres in fee or for life. The Northwest Ordinance required the members of the Legislative Council to possess a free-hold of five hundred acres, and Representatives two hundred acres within the district. Before attempting to establish a basis of representation and the qualifications of the members of the General Assembly, the Tennessee Convention experienced no little difficulty in determining whether the Assembly should be composed of one or of two houses. At one time it was voted that "the legislative power of the State should be vested in one house." [3]

This action was taken on the 19th of January, reconsidering the vote of the previous day in favor of two houses. On the 20th of January, there was a second reconsideration, and the Convention finally concurred in the report of the committee which provided for a bicameral Legislature organized upon the plan of the North Carolina Constitution.[4]

This conclusion having been reached, it was ordered that the Representatives be apportioned by the Legislature among the several counties according to the number of taxable inhabitants in each, by a census to be taken every seven years, beginning within three years after the first meeting of the Assembly, the total number of Representatives never to be less than twenty-

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[3]Journal, Convention of 1796, page 9.
[4]Journal, Convention of 1796, page 10.

two nor more than twenty-six, until the number of taxable inhabitants should be forty thousand, and after that at such a ratio that the whole number of Representatives should never exceed forty.[5]

Senators were apportioned among the districts according to the number of taxable inhabitants, each district to contain such a number of inhabitants as should be entitled to elect not more than three Senators, the whole number of Senators never to be less than one third nor more than one-half the number of Representatives. Eligibility to both houses was confined to persons twenty-one years of age, who had resided three years in the State, and one year in the county, and possessed no less than two hundred acres of land in the county.[6]

Until the first census, each county was to have one Senator and two Representatives.[7]

The Legislature was to regulate all salaries, but, until the year 1804, the following were to be paid: to the Governor, not more than $750 a year; to the Judges, not more than $600 each; to the Secretary, not more than $400; to the Treasurer or Treasurers, not more than 4 per cent of the monies received and paid out; to the Attorney or Attorneys, not more than $50 for each court attended, and to members of the Assembly, not more than $1.75 a day.[8]

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[5]Article I, section 2.
[6]Article I, section 7.
[7]Schedule, section 6.
[8]Article I, section 20.

No collector of public money was allowed a seat in the Assembly until he had satisfactorily accounted, a wise provision which was taken from North Carolina, which still holds its place with extended application in the Constitution of Tennessee.

An original feature of that part of the Constitution which defines the powers of the Legislature is, that bills may originate in either house, subject to amendment or rejection by the other. This is believed to be the first provision of the kind in any State Constitution, and it is distinctly democratic.[9]

Judges, the Secretary of State, the Attorney General, Registers, Clerks of Courts and persons holding office under the authority of the United States, were made ineligible to the General Assembly, and it was declared in the same section that no person should hold more than one lucrative office, appointments in the militia and the office of Justice of the Peace not being considered lucrative offices.[10]

Sections 26 and 27 of Article I, deal with the subject of taxation, and are in the following language: "All lands liable to taxation in this State held by deed, grant or entry, shall be taxed equal and uniform in such manner that no one hundred acres shall be taxed higher than another, except town lots, which shall not be taxed higher than two hundred acres of land each; no free man shall be taxed higher than one hundred

[9]Article I, section 14.
[10]Article I, section 23.

acres, and no slave higher than two hundred acres on each poll. No article manufactured if the produce of this State shall be taxed otherwise than to pay inspection fees."

The last provision is still retained in the Constitution of Tennessee.

The land tax clause is the most extraordinary and interesting feature of this Constitution. It has been seen that the Legislature of the Territory assessed lands, finally, at twelve and one-half cents on the acre, and town lots at fifty cents each.[11]

This territorial law followed the statutes of North Carolina on the subject. In 1784 North Carolina had taxed lands, free males and servants over twenty-one years of age, slaves between twelve and fifty years of age, and town lots, and it was enacted that "the same tax shall be laid upon every hundred pounds value of such town lots as shall be paid upon every three hundred acres of land," and that every poll should be taxed the same as three hundred acres of land.[12]

In 1786, an act was passed upon the subject of taxing lands, town lots with certain improvements, free males and servants between the ages of twenty-one and sixty, and slaves, male and female, between the ages of twelve and sixty, all lands to be taxed by the hundred acres, and in proportion for a greater or less

[11]Laws of Tennessee, Scott's Edition, volume I, page 510.
[12]Acts of North Carolina, 1784, April Session, chapter I.

quantity. Under this Act the tax on each poll was equal to the tax on three hundred acres of land, and town lots were valued as provided in the Act of 1784.[13]

Under the territorial and North Carolina Acts, the valuation of lands by the hundred acres was fixed arbitrarily, and this would seem to imply a result which was made express in the Tennessee Constitution, that no one hundred acres of land should be taxed higher than another. The Acts of North Carolina did not fix an invariable valuation upon town lots, but declared that every one hundred pounds value of each of them should be taxed in the same amount as three hundred acres of land. The territorial Act valued each town lot, without taking into consideration any improvements, while the Constitution of 1796 made the maximum tax on town lots, without reference to improvements, equal to the tax on two hundred acres of land. This allowed the assessment of town lots at a less amount than the valuation of two hundred acres of land, and as it is evident that the land tax was fixed with reference to the lands of inferior value, remote from the more populous districts, these provisions were favorable to the owners of the town lots, and not less favorable to the owners of the more valuable lands adjacent to the towns. The provision that

[13]Acts of North Carolina, 1786, chapter XV; Laws of Tennessee, Scott's Edition, volume I, page 372.

no free man should be taxed higher than one nundred acres of land, and no slave higher than two hundred, was clearly favorable to the land owners, as it would be to the interest of all free men, whether slave holders or not, to restrict poll taxes by cutting down the land tax.

This land tax clause has been very much criticised, and it has been asserted that it was contrived in the interest of large land owners and speculators, but the facts do not appear to warrant this unqualified statement, although it must be admitted that the rule laid down became, before the adoption of the Constitution of 1834, discriminative in favor of the owners of town lots and suburban lands. It is probable that in 1796, it was not inequitable, and did not work injustice to any class, the inequalities which it finally produced resulting from the growth of the towns and the increase in value of the lands contiguous or adjacent to them. The mistake of the Convention was in incorporating the North Carolina statute, injudiciously modified by the territorial Acts, into the Constitution, thus making it the permanent law of the land, and not subject to repeal or amendment as changing conditions might demand. The journal of the Convention does not furnish much light on the subject. Section 26 as first drafted by the committee and presented to the Convention, provided that no town lot should be taxed higher than one hundred acres. A motion by

Governor McMinn to strike out the entire section failed.[14]

At a later date Judge McNairy succeeded in having the section amended so as to include lands held by entry, the original having applied only to lands held by deed or grant, and by eliminating the provision that town lots should not be taxed higher than one hundred acres.[15]

It was then moved by Mr. McClung that the words "town lots" be "struck out," and this having been negatived, it was voted, upon motion of Mr. Cocke, that the section be amended so as to provide that no town lot should be taxed higher than two hundred acres of land.[16]

This action gave the section the form in which it finally appeared in the Constitution. The effect first given this section will be seen in an Act passed by the Legislature of Tennessee on the 25th of October, 1797, fixing the taxes for that and the succeeding year at twelve and one-half cents on each one hundred acres of land, twenty-five cents on each town lot, twelve and one-half cents on each free poll and twenty-five cents on each negro poll.[17]

In 1813 the land tax was increased to eighteen and three-fourths cents a hundred acres, and town lots were

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[14]Journal, Convention of 1796, page 21.
[15]Journal, Convention of 1796, page 27.
[16]Journal, Convention of 1796, page 27.
[17]Laws of Tennessee, Scott's Edition, volume I, page 762.

taxed at thirty-seven and one-half cents each, while poll taxes remained the same as in 1797.[18]

This part of the Act of 1813 was re-enacted in 1815 and appears to have been retained as late as the year 1831.[19]

This statement will indicate the limitations placed by this section of the Constitution upon the power of the Legislature to attain equality in taxation. The effect of the rule will be further illustrated by the statement that in 1792 town lots in Knoxville, containing one-half acre each, sold for eight dollars. By 1794, they appear to have doubled in value, and the records show that a lot which was worth eight dollars in 1792 sold for $2,700 in 1817. This increase, of course, was not in the value of the land alone, but mainly on account of the improvements placed upon it, but the fact will show the inequality and the injustice resulting from retaining this section of the Constitution long after the disappearance of the conditions prevailing in 1796. The historian, Phelan, characterizes this tax provision as "monstrous," declaring that it was framed by land owners and land speculators, and that the best lands and those nearest the larger towns like Knoxville, Nashville, Jonesboro and Greeneville, were in the hands of a few

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[18]Laws of Tennessee, Scott's Edition, volume II, page 158.

[19]Laws of Tennessee, Scott's Edition, volume II, page 297; Statutes of Tennessee, edited by Haywood and Cobbs, volume I, page 336.

men who by this provision which he calls "an entail law in disguise," were enabled to retain them indefinitely.[20]

The following strong disapproval of section 26 by the Supreme Court of Tennessee, through Judge Catron, who was afterwards a justice of the Supreme Court of the United States, is convincing both as the testimony of one familiar with the operation of the law, and as a judicial utterance by a high authority; "Few of the lands in Tennessee in the year 1796 were cultivated, and the most fertile sold at a very low price; hence, there was little of seeming impropriety in taxing every acre alike. The interest of the non-resident land owners, who were to pay a great proportion of the tax, had much weight, no doubt, with the Convention. They wished to put it beyond the power of the Legislature to tax their lands higher than those of the citizens. To the foregoing provision there was no good reason to object, in the then, country, but the increased value of the lands in certain sections has rendered this restriction on the taxing power so grossly absurd, as to produce attempts to violate it by the Legislature, by authorizing county courts to tax at one rate in one county, and at another in the next, and ordering the charges of the government to be paid principally out of the county treasuries." [21]

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[20]Phelan's History of Tennessee, page 253.

[21]*Marr* v. *Enloe*, 1 Yerger's Tennessee Reports, page 457.

In the same opinion Judge Catron says "It is an appalling absurdity truly, that an hundred acres of land, worth fifty cents an acre, should pay one dollar taxes, and that another hundred acres, worth fifty dollars the acre, should pay the same amount of tax." [22]

The opinion from which this quotation is taken contains the interesting information, which is borne out by an examination of the statutes, that it had been the practice in North Carolina, while Tennessee was a part of that State, to authorize the county courts to levy taxes, differing in amount and apportionment from the State taxes.[23]

But the case quoted from, declared such special statutes to be in violation of the Constitution of 1796.

The facts in connection with the adoption of the tax clauses will not support an impeachment of the Convention, or of a majority of its members, and if, as suggested by Judge Catron, non-resident land owners secured undue advantages, it was because the inexperience of the members assented to specious arguments. No doubt there were selfish and also subservient men in the Convention, but it is not to be controverted that a large majority of the members were honest and sincerely patriotic. Conservatism suggested the North Carolina and the territorial statutes

[22] *Marr* v. *Enloe*, 1 Yerger's Tennessee Reports, page 458.
[23] *Marr* v. *Enloe*, 1 Yerger's Tennessee Reports, page 456.

as precedents, and the apparently slight changes which made section twenty-six much worse than the statutes, may be accounted for by the inexperience of the members, without disparagement of their motives. The matter of land taxation had been the occasion of difference between the Legislative Council and the House of Representatives of the Territory when the Act of 1794 was passed, the Council contending for a much lower rate than the one which the House at first approved, and which was adopted in that year, but which was reduced by the act of 1795.[24] A suspicious mind might have found reason for attributing selfish motives to the Legislative Council, as John Sevier was a large land owner, and Stockley Donelson, another member of the Council, the largest in East Tennessee, and probably in the Territory, but neither Sevier nor Donelson was a member of the Constitutional Convention.

The North Carolina land tax law took the shape in which it passed into the territorial legislation, in 1784. Lands had been taxed in that State before that time, as is clearly shown by an Act passed in 1782, but Iredell's compilation of the statutes, the sole accessible authority, contains only the captions of Acts passed upon the same subject in 1779 and 1777. The Province levied only poll taxes, although the quit rent was paid to the proprietary government.

Tennessee was one of the first States to declare in

[24]Journal, Legislative Council, pages 30 and 32.

favor of uniform taxation, but it was not until 1834 that the declaration was made at all effective.

In the year 1796 all the States were taxing lands, fourteen of them directly, and one, Delaware, indirectly.[25]

Vermont, like North Carolina, taxed lands at a uniform arbitrary amount according to quantity; New York and Rhode Island according to value; Massachusetts and New Hampshire according to their products; Connecticut according to their uses; Pennsylvania at a triennial valuation; Virginia at a permanent valuation; Maryland and New Jersey according to relative values in different counties and districts; Kentucky in three classes or grades according to quality, and uniformly in each class; and South Carolina and Georgia uniformly in classes or districts, whether cultivated or not.[26]

Probably none of these was quite so bad as the Tennessee plan, but certainly some of them were not much better, and considered together they indicate a general want of knowledge of the true principles of taxation which must palliate the error of the Tennessee Convention.

Under the Constitution of 1796, the Governor was elected by the people for a term of two years. He was required to be twenty-five years of age, and to own

[25]Ely's "Taxation in American States and Cities," page 118.

[26]Ely's "Taxation in American States and Cities," pages 119-120.

five hundred acres of land, whereas the Governor of North Carolina was required to be thirty years of age and to own a freehold in land above a thousand pounds in value. The succession to the Governorship was in the speaker of the Senate, an undemocratic arrangement which remains in the present Constitution. The Legislative Council, created by the Constitution of North Carolina was omitted wisely, as there was no need for it, and in the course of time it came to be an obstruction to efficient administration in North Carolina.

The Governor could be elected for only six years out of any term of eight, and this rule has been invoked several times in the history of the State.

The suffrage was extended to all free holders over the age of twenty-one years, and to other male citizens over twenty-one years of age who had been for six months resident in the county. This permitted free negroes to vote, and they did vote until disfranchised in a summary manner, to be hereinafter described, by the Constitution of 1834. This disfranchisement resulted principally from the immigration of free negroes who were attracted by the rights extended them under the first Constitution.

The judicial power of the State was vested by the Constitution of 1796 in such superior and inferior courts of law and equity as the Legislature might establish, and this was one of the most defective and ill-considered of its provisions. The Constitution of

North Carolina, established no court system. The original draft of the Constitution of 1796 vested the judicial power in a superior court consisting of three Judges, a court of pleas and sessions, and such other courts as the Legislature might establish. This was not approved however, and the establishment of courts was left entirely to the Legislature, practically as in North Carolina. Strangely enough, this unfortunate change was made upon the motion of James Robertson, seconded by John Rhea. The Constitution of the United States, establishing three co-ordinate and independent branches of government had been in operation seven years, and there were other precedents which should have been controlling upon the Convention of 1796. It should be stated that while in 1796 the question of the power of the Federal and State Supreme Courts to pass upon the constitutionality of legislation was practically settled, so far as the courts and the lawyers were concerned, Robertson and many of his associates were not lawyers, and the American people had yet to learn the great service that an independent judiciary is capable of rendering. It should have been plain to any one however that a court created by the Legislature and subject to abolition in the same manner, was not an independent body, and certainly not co-ordinate with the law-making power. It is familiar history that the Legislatures of the States were extremely reluctant to admit the right of the courts to set aside their Acts, and when the

Legislature and the courts of Tennessee came into opposition there was serious danger that the existing courts would be abolished and others created. This would have been a most unfortunate subordination of the judicial to the legislative power, and at present, would not be tolerated in any State.

The remainder of the article, dealing with the judiciary, was not carefully recast after the change of the first section as above indicated, and frequent references are made in it to Judges of the superior courts and their powers. It was provided that the Judges of the superior and inferior courts, and the Attorney or Attorneys General for the State should be elected by joint ballot of both houses of the General Assembly, to serve during good behavior. The original draft of the Constitution provided that the Judges of the superior courts of law should have equity jurisdiction, but that the Legislature might, when the finances of the State should permit, divest them of that jurisdiction, and create a separate court of chancery. This, however, was replaced by the provision that the Legislature might establish courts of law and equity. The power of the Legislature to make and unmake courts was properly exercised in 1809, when the Superior Court was abolished and the Supreme Court and the Circuit Courts created. But, when the Legislature failed in the effort to impeach a Circuit Judge, an Act was introduced to abolish the whole system, and lacked only one vote of passing.

Each court appointed its own clerk to hold office during good behavior, and Justices of the Peace were appointed by the General Assembly, and commissioned by the Governor to hold office for a like term; the number not to exceed two for each captain's company, except for the companies including the county towns, which were entitled to not more than three.

Coroners, Sheriffs, Trustees and Constables were elected by the County Court for two years, and the same body appointed Registers and Rangers to serve during good behavior.

The militia law was elaborate as the time required, and it will be understood readily, why legislative action was not necessary then, as now, to call out the troops.

It was affirmed in the Declaration of Rights "that all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; and that no man can of right be compelled to attend, erect or support any place of worship, or to maintain any minister against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; that no preference shall ever be given by law to any religious establishment or mode of worship; and that no religious test shall ever be required as a qualification to any office or public trust under this State.[27]

It is not easy to reconcile this emphatic rejection of

[27]Declaration of Rights, Articles III and IV.

religious tests with another provision making a belief in God and a future state of rewards and punishments a condition to civil preferment, but probably the Convention had in mind the English test Acts, requiring adherence to a particular creed, or actual participation in certain rites. The North Carolina Declaration of Rights said nothing of religious tests, but the provision in the body of the Constitution was severe and narrow in spirit. The committee to formulate the Constitution of 1796, composed, as we have seen, of twenty-two of the most capable members of the Convention, did not follow the North Carolina Constitution in that respect, but omitted any religious test whatever, but on motion of Mr. Doherty, seconded by Governor Roane, the Convention on the 2nd of February, agreed to an amendment to the effect that no person who publicly denied the being of a God, or the doctrine of future rewards and punishments, or the divine authority of the Old and New Testaments, should hold any office in the civil department of this State.[28]

On the same day, however, on the motion of Landon Carter, seconded by Mr. Mitchell, the words "or the divine authority of the Old and New Testaments" were eliminated, the vote standing twenty-seven yeas and twenty-six nays.[29]

On the 5th of February, on the motion of Mr. Lewis,

[28]Journal, Convention of 1796, page 23.
[29]Journal, Convention of 1796, page 24.

seconded by Mr. Rhea, the word "publicly" was excluded, and the section left in the form in which it appears in the Constitution.[30]

In North Carolina, freedom of religious opinion was sufficiently guaranteed, but only protestants had the right to civil preferment. The Tennessee Constitution was more liberal because it established equality between protestants of all denominations, and catholics; and it is not recalled that there was ever a suggestion, during the life of the Constitution of 1796, of the exclusion of a citizen from office on account of his religious opinions. That the Constitution did not go as far as the liberal sentiments of the present time would require, is undoubtedly true, but, its practical effect was to establish unlimited religious liberty. Considered with reference to the conditions of the time it was exceptionally liberal and just in this respect. It was not until 1835 that religious liberty was established in North Carolina.

The liberty of the press received the strongest guaranty in the Constitution of 1796 in the following words: "The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty." [31]

Imprisonment for debt was permitted, but, as in

[30] Journal, Convention of 1796, page 29.
[31] Declaration of Rights, section 19.

North Carolina, it was provided, "that the person of the debtor, where there is not a strong presumption of fraud, shall not be continued in prison, after delivering up his estate for the benefit of his creditor or creditors, in such manner as shall be prescribed by law." This provision appears in the Declaration of Rights of 1834, but imprisonment for debt was, in effect, abolished by statute in 1842.[32]

That is to say, the statutes authorizing the issuance of the writ of *capias ad satisfaciendum*, called an execution against the body, were repealed in that year, and therefore there was no way of enforcing the constitutional right to the remedy. The repealing Act was held to be constitutional, but was not given the effect of depriving the courts of power to commit defendants for failing to pay fines and costs in criminal cases.[33]

By the original draft of the Constitution ministers of the gospel were made ineligible to any civil or military office, or any place of trust, but this was modified so as to exclude them only from seats in the General Assembly.

The historian, Ramsey, seems to approve the tradition that the State was given its name upon the suggestion of General Jackson, but Phelan calls attention

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[32]Statutes of Tennessee, edited by A. O. P. Nicholson, page 176; Acts of Tennessee, 1842, chapter III.

[33]*Woodfin* v. *Hooper*, 4 Humphrey's Tennessee Reports, page 13; *Cagle* v. *State*, 6 Humphrey's Tennessee Reports, page 391.

to the fact that the Territory South of the Ohio was already generally known as the Tennessee Country, and this statement is abundantly supported.

Section 2, of Article X, of the Constitution declared that, "All laws and ordinances now in force and use in this Territory, not inconsistent with this Constitution, shall continue to be in force and use in this State until they shall expire, be altered or repealed, by the Legislature." This section, in effect, re-enacts the Acts of North Carolina, chapter 31, 1715, chapter 5, 1778, and condition 8, of the cession Act of 1789. It was retained in the Constitution of 1834, and in the Constitution of 1870, in each of which it appears as section I of article XI. In this connection it should be stated that the Supreme Court of Tennessee has held that the common law as it stood in 1775 was adopted in this State.[34]

By common law is meant, "our own precedents, practice and reports, and the English reports, and other books usually considered the depositories of the common law before the Revolution * * * making in all cases the necessary allowances for its applicability and suitableness to our situation," and cases in Westminster Hall since the Revolution are not binding in our courts as authority.[35]

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[34]*Porter* v. *State*, Martin and Yerger's Tennessee Reports, pages 226-227, and *Laird* v. *Scott*, 5 Heiskell's Tennessee Reports, page 314; see also, Comprehensive Note, by W. F. Cooper, 1 Overton's Tennessee Reports, page 169.

[35]*Stump* v. *Napier*, 2 Yerger's Tennessee Reports, page 45.

It has also been held that the statute laws of England, while not in force in this State since it adopted a code in 1858, were not annulled by the code in so far as they had been adopted as rules of property and had settled principles of law.[36]

The provision under consideration has also been construed as continuing in operation the laws of North Carolina which were in force at the time of the passage of the cession Act, except as repealed or amended by the territorial or State Legislature.[37]

The Declaration of Rights is made up of familiar principles, with the addition of one local article in regard to the free navigation of the Mississippi, and another declaring that the people residing south of the French Broad and the Holston, between the Tennessee and Big Pigeon rivers were entitled to the right of preemption and occupancy of their lands. These settlements were begun under the State of Franklin, or at least made the Franklin treaties with the Cherokees the basis of their claims. As these treaties were not recognized by North Carolina, the settlements were made contrary to law, and the claims of the settlers were not technically good. But, a writer upon the subject has said justly, "So far as the other citizens of the State were concerned, they had earned by sweat and blood, with axe and rifle, a prior claim to the fields

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[36] *State* v. *Miller*, 11 Lea's Tennessee Reports, page 620.
[37] *Egnew* v. *Cochrane*, 2 Head's Tennessee Reports, page 320.

which they had cleared, and the cabins which they had raised and guarded." [38]

On the first day of February, it was moved by Mr. Outlaw, one of the ablest and most conservative members of the Convention, and seconded by Joseph Anderson, who was inferior in prominence and influence, probably, only to Blount, that a vote be taken upon the question, "Whether it is the sense of this house, that if we should not be admitted by Congress as a member State of the general government, we should continue to exist as an independent State." [39]

On the motion of General Cocke, this question was postponed, although it appears that there was objection to the postponement. It is to be regretted that the yeas and nays were not recorded.

It is possible that the Convention considered the preamble a sufficient declaration of independence, and believed that Congress would remember the history of the State of Franklin, and the almost insurrectionary attitude assumed by Kentucky in the course of its struggle for statehood. Mr. Outlaw's motion indicates the existence of doubts among the members as to the action of Congress, which were suggested probably, by the experiences of Kentucky and Franklin.

The provisional draft of the Constitution left blank

[38] "The Constitution of 1796," by E. T. Sanford; Proceedings Bar Association of Tennessee, 1896, page 126.
[39] Journal, Constitutional Convention, 1796, page 20.

the date for the first election of Senators and Representatives, and the Convention inserted the "2nd Thursday of March next." [40]

The date for the first meeting of the General Assembly was likewise left blank, and the Convention inserted "the last Monday of March next."

The seat of government was established at Knoxville until the year 1802, and on the 6th of February, 1796, after being in session twenty-seven days, the Convention adjourned without making provision for submitting the Constitution to the people. A copy of that instrument, handsomely engrossed, was delivered to the President of the Convention, to be forwarded to the Secretary of State of the United States. The last resolution of the Convention directed the issuance of writs for holding the first election of members of the General Assembly and of a Governor, under the authority of the Constitution of the State of Tennessee, to bear test of the date of February 6, 1796, thus treating the Constitution as in effect, and the State as in existence on that date.[41]

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[40]Journal, Constitutional Convention, 1796, page 12.
[41]Journal, Constitutional Convention, 1796, page 32.

CHAPTER VII.

THE CONSTITUTION OF 1796—Continued.

1796-1835.

Phelan, the historian of Tennessee, declares that "if we examine the Constitution (of North Carolina) of 1776, we will find that it has introduced absolutely not a single feature into North Carolina institutions with which we are not already familiar." [1]

That Constitution, with a few modifications, was adopted by the State of Tennessee twenty years later, and of this version of the instrument Mr. Phelan says that it contained such changes of the "North Carolina Constitution as were commensurate with the progress of democratic ideas in America, giving less power to the representatives of the people, and more to the people themselves, but leaving the seeds of future dissentions in the election of county officers and the taxation of land." [2]

No Tennessean who writes or speaks of the early history of his State fails to quote Mr. Jefferson's declaration that the Constitution of 1796 was "the

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[1] Phelan's History of Tennessee, page 196.
[2] Phelan's History of Tennessee, page 199.

least imperfect and most republican of the state constitutions." [3]

Monette, author of the History of the Discovery and Settlement of the Mississippi Valley, says: "The new Constitution in its general features, was more democratic than that of the parent State, and imposed fewer restraints not absolutely necessary for good government. In its provisions it illustrates the principle established by all subsequent Constitutions, that the new States as well as the older, which have remodeled their Constitutions, exhibit a uniform tendency in the public mind to render government more and more the instrument of the popular will." [4]

It may be well to recapitulate at this point, the important changes made by the Tennessee Convention. The rejection of the name "House of Commons" for the lower house of the Assembly was in good taste and judgment, if it was of no practical importance. The Governor's Council was omitted wisely, as it was a survival of colonial times, and had been productive of discord and trouble in North Carolina. No one will dispute the propriety of omitting borough representation. The property qualification of the Governor was reduced from one thousand pounds worth to five hundred acres of land, a reduction not capable of exact statement on account of the extreme variability of the

[3] Ramsey's Annals of Tennessee, page 657.

[4] Monette, volume II, page 280; quoted by E. T. Sanford; Proceedings Bar Association of Tennessee, 1896, page 130.

value of money in North Carolina, and of land in Tennessee at that time. The property qualification of State Senators was decreased from three hundred to two hundred acres, but in the case of Representatives there was an increase from one hundred to two hundred acres. The religious test was distinctly less severe in Tennessee than in North Carolina, and at least one learned writer on constitutional history says that there was no such test in Tennessee. Annual meetings of the Legislature were the principal safeguard of the Provinces against usurpation by the Governors, and it was natural that North Carolina should retain the custom in its Constitution, but the adoption of biennial meetings in Tennessee was a democratic and well considered improvement and was a proof of the growing confidence of the people. More definitely democratic was the change in the mode of electing the Governor, who was chosen by the Assembly in North Carolina, and by the people in Tennessee. The 19th section of the North Carolina Constitution gave authority to the Governor to lay embargoes and to prohibit exportations for not exceeding thirty days at any one time, but this provision was omitted by the Tennessee Convention with proper regard for the Constitution of the United States. North Carolina made provision for Judges of Admiralty but Tennessee did not. Justices of the Peace in North Carolina were recommended by the Representatives to the Governor, and commissioned by him to hold office

during good behavior; in Tennessee Justices were appointed by the Legislature, and commissioned by the Governor, the difference being rather in the wording of the provision than in the actual procedure. It has been shown that in North Carolina there was no express power in the Legislature to create courts, while in Tennessee there was such power. The Tennessee Constitution contained in addition to those already mentioned, a number of provisions that did not appear in the older instrument, but which in the main, were amplifications of those that did appear. The North Carolina Declaration of Rights contained only twenty-five sections while that of Tennessee contained thirty-two, but with a few exceptions, the additions were not important, and affected the form rather than the substance of the instrument. Among the important additions are section ten which declares that no person shall for the same offense be twice put in jeopardy of life or limb, and the last clause of section seventeen which authorizes suits against the State by its own citizens. No provision similar to the one last named is to be found in any of the eighteenth century constitutions except that of Delaware, which authorized suits against the State without limiting the right to its own citizens.[5]

The North Carolina Declaration of Rights was constructed largely with a view to occurrences under the

[5]Thorpe's Constitutional History of the American People, volume I, page 61.

provincial government, and contained certain features that were neither necessary nor proper twenty years later, although, there were a few sections in the Tennessee Declaration which were directed against contingencies that could not possibly arise under a republican form of government.

Section 11 of article V, of the Tennessee Constitution ordered that no fine exceeding fifty dollars should be laid upon any citizen of the State unless assessed by a jury of his peers, and this provision, was one of the points of attack when the Constitution was submitted to Congress in 1796, the objection being that, apparently, it discriminated in favor of the citizens of the State. The objection to the Constitution made by the Federalists in Congress, that there was no limit to the power of the Legislature, was not entirely without justification, but was made without regard for, or without knowledge of, section 4 of article X, which ordains that "The Declaration of Rights here enacted is declared to be a part of the Constitution of this State, and shall never be violated on any pretense, whatever. And to guard against transgression of the high powers which we have delegated, we declare, that every thing in the Bill of Rights contained, and every other right not hereby delegated is excepted out of the general powers of government, and shall forever remain inviolate." The real ground of criticism was not the want of any limitation upon the powers of the Legislature, but the excessiveness of the powers

expressly granted it, especially in the matter of the appointment of officers. The Federalists probably would not have made this objection at a later period, when the relative functions of Federal and State government were better understood. There was nothing in the Tennessee Constitution which did not comply with the Ordinance of Congress requiring a republican form of government, and defects of the kind under consideration did not affect Congress, or the State in its federal relations, but only the people of the State.

The defects of the Constitution of 1796 were unimportant in the beginning. Tennessee was a frontier community, or rather two frontier communities, one in the valley of East Tennessee, and the other more than a hundred miles west of it, and separated from it, as the Federalists declared, by a "hostile jurisdiction." For a number of years after the adoption of the Constitution, the one great essential was an efficient executive, affording the people adequate protection of life and property during their struggles against the Indians, and against adverse physical conditions. Not until population and wealth had greatly increased, and the State had passed out of the pioneer period, and had found leisure to give attention to civil affairs, did discontents arise on account of the imperfections of the organic law. The land tax seems, upon the whole, to have excited less opposition and discontent than would be inferred from its obvious injustice. The earlier records of the State seem to indicate that the

most frequent and pronounced dissatisfactions were occasioned by the judicial system.

The North Carolina judiciary Act of 1777, which was, in effect, re-enacted by the first General Assembly of Tennessee, provided for a Superior Court of law[6] and equity, with a general original jurisdiction, and appellate jurisdiction of cases arising in the Court of Pleas and Quarter Sessions. The last named Court was the equivalent of the present County Court of Tennessee, but with a much larger jurisdiction. The Superior Court, as established in 1796, was composed of three Judges, who were compelled to attend at each session, although, one or more could, in case of necessity, hold the court. In 1807, a fourth Judge was added,[7] and this system continued until the passage of the Act of 1809 which took effect in January, 1810,[8] by which a Supreme Court of Errors and Appeals was established, consisting at first, of two Judges, but afterwards, in 1815, increased to three, in 1823 to four, and in 1824 to five. In the last named year the number was reduced to four, and so continued until the courts were reorganized under the Constitution of 1834. In 1831 the office of Chief Justice was created and John Catron was elected to the position.

By the Act of 1809 five circuits were established and as many circuit judges provided for, and one of these circuit judges sat in each of the circuits with

[6]Acts of Tennessee, March, 1796, chapter I.
[7]Acts of Tennessee, 1807, chapter 34.
[8]Acts of Tennessee, September, 1809, chapter XLIX.

the two judges of the Supreme Court. By an Act passed in 1811,[9] the provision requiring the attendance of the circuit judges was repealed, and from that time until another judge was added, in 1815, the two supreme judges sat alone, their concurrence being necessary to the reversal of a judgment of the lower court, and their failure to concur having the effect of an affirmance. The Act of 1811, gave the Supreme Court exclusive jurisdiction of all equity cases arising in the Circuit Court, but in 1813, Circuit Courts were again given concurrent jurisdiction in equity.[10]

The Act of 1813 provided that an appeal might be taken directly from the County Court to the Supreme Court, if both parties consented, otherwise the appeal was to the Circuit Court. Supreme Courts sat annually at the places designated by statute. Reference has been made, in the chapter on North Carolina institutions, to the Court of Chancery of the Province and of the State, but it is proper to consider the matter further at this point. Generally speaking, the powers of the Court of Chancery in North Carolina in each of the successive governments, and however constructed, were substantially, those of the English Chancery Court. The language of the North Carolina Constitution, while it did not specifically provide for them, clearly intended that courts of equity, should be created by the Legislature, but no separate chancery

[9]Acts of Tennessee, 1811, chapter LXXII.
[10]Acts of Tennessee, 1813, chapter LXXVIII.

court was established until 1782, when it was enacted that each of the superior courts of law should also be a court of equity with the powers of the court of chancery of the colonial government in so far as was consistent with the laws and Constitution of the State.[11]

This Act was an improvement upon the English chancery system in that it made the equity court one of record.[12]

In 1787, North Carolina passed an Act providing that the chancery branch of the Superior Court should be styled the "Court of Equity" and providing a Clerk and Master for each Court of Equity, but not creating additional judges.[13]

We have seen already how this system came into Tennessee. In 1801, our Legislature passed an Act to regulate practice in the court of equity, establishing a procedure which, in large part, is retained at the present time.[14]

In 1819 an Act was passed authorizing the taking of depositions in the Chancery Court, the old practice having been to allow witnesses to give oral testimony.[15]

In 1822 it was enacted that the Chancery Court should be held by one of the Judges of the Supreme

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[11]Laws of Tennessee, Scott's Edition, volume I, page 261.
[12]Laws of Tennessee, Scott's Edition, volume I, page 264.
[13]Laws of Tennessee, Scott's Edition, volume I, page 389.
[14]Laws of Tennessee, Scott's Edition, volume I, page 685.
[15]Laws of Tennessee, Scott's Edition, volume II, page 485.

Court, and in 1824, it was ordered that it be held twice a year in each circuit.[16]

The most important step in the evolution of the Chancery Court, as an institution, was taken in 1827, when the State was laid off into two Chancery divisions, the Eastern and the Western, with a Chancellor provided for each, but both having jurisdiction over the entire State.[17]

No detailed history of the county courts under the first Constitution will be attempted, but it is necessary to indicate their jurisdiction and methods of procedure. They had then, as now, jurisdiction of the probate of wills, and the administration of estates, and were authorized to try all cases of law within their respective counties where the debt did not exceed the amount specified in the Acts passed from time to time. They had jurisdiction of actions of dower, partition, and trespass, of petit larcenies, batteries and other misdemeanors "of an inferior nature;" of the actions of detinue and trover, and generally of proceedings under penal statutes. The jurisdiction as to amounts and as to cause of action varied from time to time, but enough has been stated to show that the powers of these courts were very much larger than was warranted by the judicial capacity of their members. The practice was that of the old common law courts slightly modified from time to time. The plaintiff

[16]Gibson's Suits in Chancery, section 12.
[17]Gibson's Suits in Chancery, section 12.

brought his suit by summons and declaration, the defendant replied by a plea, and the case ordinarily, was heard before a jury. Individual justices had jurisdiction in amounts varying at different times, but extending in 1829 to as much as one hundred dollars in certain cases.

In 1813, a most extraordinary Act was passed, providing for the appointment of five judges of the Court of Pleas and Quarter Sessions, in each county, with the intent that they should hold the court to the exclusion of the justices, who retained, collectively, only their administrative powers, and were required to transact the county business on the first day of the term, and then give way to the judges. The Act made provision for further confusion by giving the Circuit Courts original and concurrent jurisdiction of all cases triable in the Courts of Pleas and Quarter Sessions.[18]

This Act was repealed in 1815 in the briefest possible terms.[19]

These statements will serve to indicate the confusion of jurisdiction, the possibilities of delay, and the general awkwardness of the judiciary establishment. The deficiencies of the system attracted the public attention and condemnation long before the Convention of 1834 was called. In 1822, Governor Carroll, in a message to the General Assembly said, "A well

[18]Laws of Tennessee, Scott's Edition, volume II, page 156.

[19]Laws of Tennessee, Scott's Edition, volume II, page 210.

regulated and independent judiciary is so essential to the character of the State and to the peace and happiness of every citizen, that it has a strong claim upon your attention at all times, and especially at the present, when the business of the courts has so accumulated that notwithstanding the best efforts of the Judges, a delay of justice almost equivalent to a denial is unavoidable."[20]

In 1824 Carroll again pressed the subject upon the attention of the Legislature saying; "It would seem to be of the utmost consequence to have a well organized and efficient court, possessing the public confidence, to decide causes in the last resort. And I never could see the necessity or propriety of having several successive appeals, as to matters of fact." [21]

In his message of 1825 he said that public opinion appeared to call for a consideration of the subject and that an "extensive change" should be made. Outlining a plan, he insisted that there should be only one court to try jury cases, and a purely appellate court of last resort to decide all questions of law, and that there should be a separate court of equity. With his usual sound judgment he commented on the fact that the system had undergone alterations at each session of the Assembly for several years past, and affirmed that

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[20]Journal, Tennessee House of Representatives, 1822, page 7.

[21]Journal, Tennessee House of Representatives, 1824, page 6.

the judiciary should be stable in character so as to insure uniformity and independence of decision.[22]

The most severe arraignment of the system was made by the judiciary committee of the State Senate in a report presented in November, 1829.[23]

The committee through its chairman, Mr. Huntsman, said, "We consider the judiciary system of Tennessee the most expensive and the least efficient of any in the United States." [24]

The objections presented by the Committee were, first, the multiplicity of courts which, either as original or appellate, could take jurisdiction of the same subject matter; second, the defective "mode by which these courts are governed;" third, the great delay of right to the parties, and the unnecessary expense incurred by the number of courts in which the same cause could be investigated. The report states that at the time when it was presented justices of the peace had exclusive jurisdiction of sums not exceeding fifty dollars, and concurrent jurisdiction with county and circuit courts, of sums from fifty dollars to one hundred dollars, when evidenced by bond, or liquidated account. The committee then, as illustrating the confusion of jurisdiction and the opportunities for delay, declares that a suit might be commenced before a justice for a sum not exceeding fifty cents, trial had, and

[22]Journal, Tennessee House of Representatives, 1825, page 10.
[23]Journal, Tennessee Senate, 1829, page 332.
[24]Journal, Tennessee Senate, 1829, page 332.

an appeal taken to the County Court, then a trial before a jury, followed by an appeal to the Supreme Court; this last trial the committee very properly observes, should end the proceeding, but it affirms that even after this, a bill in equity might be filed in the Chancery Court, and appealed to the Supreme Court, making six hearings of the one case. It appears from the report that very few of the justices of the county courts were "well skilled in the laws," that they were usually without education, and some without the capacity to understand the laws. One assertion made in the report is of particular interest, to-wit, that while the Constitution entrusted the appointment of justices to the General Assembly, custom had, in effect, taken the power from that body and placed it in the hands of the different militia organizations whose sole object in the selection of magistrates was to promote the interests of favored candidates for office. Criticising the Circuit Court, the committee declared that too much time was consumed in argument. The expense of jurors in the county courts was declared to be "enormous," these courts meeting four times a year, with an average of eight days for each term, the smaller counties having twenty-six, and the larger ones thirty-seven jurors. It was stated that in some of the larger counties there were more than one hundred appeals annually from the County Court to the Circuit Court, and that by limiting jury trials to the Circuit Court, the State would save annually over forty-six thousand

dollars. The report therefore earnestly recommended the withdrawal of the jury from the county courts. It will be noticed that this report was presented after the Act of 1827 creating the chancery divisions had been passed.

Not only was the court system defective, but the Judges in many instances gave cause for complaint, and impeachments, sometimes properly instituted, but as often based upon frivolous pretexts, were unfortunately numerous. It is said that impeachments became a favorite resort of defeated lawyers for shifting upon the courts the responsibility for their professional failures. This, however, is one of the exaggerated statements on the subject which have been current in tradition and have not been wholly excluded from the histories of the State. It must be admitted that the early Judges were often careless in the discharge of their duties and did not always evince a proper sense of official responsibility. The lawyers were not without fault, and the litigants never failed to assert the right of ready and sharp criticism of superiors which was characteristic of the frontiersmen.

The people had not yet learned the duty of obedience to the law and of respect for its administrators. It is shocking to the improved sense of professional propriety of our day, but illustrative of conditions in that early time, to know that on one occasion, a Judge made himself so unacceptable to the lawyers of his circuit that they entered into a league and covenant

to "duck" him, if he did not mend his ways. The Historian, Ramsey, gives an account of the court house at Greeneville, which had been also the state house of Franklin, describing it as a small log house without doors, windows or floor, lighted by the opening which served as a door and by the spaces between the logs of the wall. One of the Judges, when impeached, gave as an excuse for failing to hold a term of court at the time required by law, that the court house, having been invaded by swine during vacation, was infested by fleas. It is no cause for wonder that with Judges too frequently inefficient, with ignorant and unqualified justices of the peace, conducting courts with a full equipment of jury and grand jury, and complicated common law procedure, with individual justices, County Courts and Circuit Courts having in many instances concurrent jurisdiction, with the right of appeal from the County Court to the Circuit Court, and also to the Supreme Court, with the right of trial by jury, first in the County Court and then in the Circuit Court, with constant delays in the administration of justice, and ruinous costs, the whole judicial system, despite the competency and high character of most of the Judges, not only became unpopular, but received and deserved a large measure of positive condemnation. It is almost inconceivable now, that one branch of the State government should condemn another in such terms as the Senate committee of 1829 applied to the judiciary, and nothing but the strongest

reasons could have induced Governor Carroll, who, while a brave and able man, was also a just one, to continue his censures of the court system through so many years. It is surprising that the people of the State so long endured a condition so unsatisfactory. For not less than fifteen years, complaints of the judiciary were heard constantly, and yet sentiment in the State continued to oppose a Constitutional Convention, the only possible means of relief.

For five years after the Senate committee of 1829 made its report, the State retained the system so severely and so justly condemned in that document. This reluctance to amend the Constitution appears also in the fact already mentioned, that the Legislature, more than once was willing to attempt evasions of the tax laws, which were wholly unworthy of the Assembly and of the State, instead of demanding a Constitutional Convention to remedy the evils that are not too harshly described as intolerable.

Property qualifications for the exercise of political rights which appeared in some form in all the early Constitutions, steadily grew in unpopularity throughout the Union, and in Tennessee opposition to them was strengthened by the example of other States which omitted these undemocratic features from the Constitutions which they adopted between 1796 and 1834. The life tenure of the Judges also created dissatisfaction in Tennessee, and was held to be one cause of the misconduct and of the consequent impeachment of

so many Judges. By the time of the meeting of the second Constitutional Convention, political leaders in the State were fully aware that public sentiment demanded that the people be given the right to elect their officers, and this sentiment was particularly strong with reference to the selection of justices of the peace, and other county officers.

There was much well founded dissatisfaction on account of constant private and special legislation. In 1829 the Legislature passed one hundred and seven public, and three hundred and forty-seven private Acts; in 1833, ninety-one public, and three hundred and five private Acts.[25]

Divorces were granted by the Legislature, consuming much of its time, and causing no little scandal, although it would appear that the Assembly was very conservative in the matter, for while in the six years preceding the Convention of 1834 there had been one hundred and sixty-three applications for divorce, only sixty had been granted, a much better record than the average modern divorce court can show.[26]

The election of members of Assembly to other State offices was strongly disapproved, and the Convention of 1834, found upon inquiry that in all, there had been nineteen such elections between 1796 and 1834.[27]

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[25]Journal, Constitutional Convention, 1834, pages 190, 191.

[26]Journal, Constitutional Convention, 1834, page 79.

[27]Journal, Constitutional Convention, 1834, pages 15 and 49.

This was not a large showing, but the policy was wrong, and was in direct violation of the Constitution which provided in section 24 of article I that: "No member of the General Assembly shall be eligible to any office or place of trust, except to the office of a justice of the peace or trustee of any literary institution, where the power of appointment to such office or place of trust is vested in their own body."

Changed conditions, permanent peace within the State and the steadily decreasing importance of the militia system, demonstrated the impropriety of continuing the captain's company as the administrative unit within the county.

While there was to the last, strong opposition to the Constitutional Convention, the public mind had become fairly settled, at the end of the third decade of the 19th century, to the conclusion that in the near future a Convention must be called, and the Constitution recast according to democratic principles. The strongholds of the conservatism which so long delayed the Convention, were the larger property holding class and the office holders, the one fearing, indeed knowing, that the tax laws would be changed to their disadvantage, and the others apprehending loss of place.

It is difficult even now to contemplate without indignation or at least impatience, the long postponement of constitutional reform, but at length the Convention was called.

Meanwhile, the State, in many respects, had been making satisfactory progress. The criminal laws had received very little attention during the first ten years, but, in 1807, an Act was passed prescribing penalties for certain of the more serious crimes, which had the general effect of lightening punishment, although it fell far short of our later conceptions of justice and humanity. "Simple larceny" was punished, for the first offense by not exceeding thirty-nine lashes at the public whipping post, imprisonment not exceeding twelve months and a judgment of infamy; for the second offense, by death without the benefit of clergy; horse stealing, for the first offense, by not more than thirty-nine lashes, imprisonment for not less than six months nor more than two years, exposure in the pillory two hours on three different days, judgment of infamy and branding with the letters "H. T." on such part of the person as the court might designate, and for the second offense, by death without the benefit of clergy.[28]

In 1813 an Act was passed which declared in the preamble that the laws theretofore in force in the State had been found insufficient to restrain and punish the crimes of forgery and counterfeiting, and thereupon, the punishment for these offenses was declared to be death by hanging without the benefit of clergy.[29]

The messages of the Governors, which were much

[28]Acts of Tennessee, 1807, chapter LXXIII.
[29]Acts of Tennessee, 1813, chapter LXV.

more effective and important then than now, began very early to indicate disapproval of the severity of the penal statutes, and in 1813 an Act was passed requiring the clerks of courts to open subscription lists for the purpose of erecting a penitentiary,[30]

In 1815 this Act was continued, and it was made the duty of the justices of the peace appointed to make the tax assessments to present subscription lists to the tax payers. It is hardly necessary to add that the plan was not successful. In his message in 1819, Governor McMinn presented the matter to the Legislature, declaring previous attempts to have been fruitless, and urging the necessity of establishing a penitentiary. In 1825, Carroll, the wisest and most useful of all the Governors before the civil war, said in his message, "The great objects which all well regulated governments have sought to attain in the enactment of criminal laws have been the prevention of crimes and the reformation of culprits. And it may be assumed as an undeniable fact that these ends are best secured by laws mild in their character, but speedy, certain and equitable in their administration. To secure these valuable purposes, a revision of our criminal laws and the establishment of a penitentiary are thought to be advisable * * *. The subject is presented to your consideration from a full conviction that the happiness of society will be more secure, and the ends of justice and humanity better

[30]Acts of Tennessee, 1813, chapter LXXVII.

advanced, by condemning the guilty to solitary imprisonment, hard labor and coarse diet, than by the disgusting public exhibitions of the enforcements of our criminal laws at the pillory and whipping post."[31]

These utterances are certainly creditable to Governor Carroll, and happily they expressed a sentiment which had become general in the State and which was made effective by an Act passed in 1829 for the erection of a penitentiary at Nashville.[32]

At the same session of the Legislature the penal code, so far as felonies were concerned, was reformed and new and milder punishments prescribed for crimes of that class below the grade of murder, the Act to take effect whenever the Governor should declare the penitentiary ready for the reception of convicts.[33]

The tenor of this Act will be sufficiently indicated by the fact that the crime of horse stealing so severely and repulsively punished by the earlier laws, was now made punishable by imprisonment in the penitentiary not less than three nor more than ten years. The two Acts last mentioned had the effect of relieving the criminal code of the State of practically all its more repulsive features, and in his message in 1831, the excellent Governor had great satisfaction in announcing that the work of constructing a penitentiary had begun on the first of April, 1830, and had proceeded

[31]Journal, Tennessee House of Representatives, 1825, page 11.
[32]Acts of Tennessee, 1829, chapter V.
[33]Acts of Tennessee, 1829, chapter XXIII.

so rapidly that on the first of January, 1831, he had been able to issue his proclamation declaring the institution ready for the reception of convicts. He added, "since then, nineteen convicts have been received who conduct themselves with great propriety, and more than cover all their expenses by the profits of their labor." [34]

In his enthusiasm for the new institution and his intense gratification over the repudiation of the whipping post and the branding iron, the Governor drew an almost pleasing picture of the convict locked in his cell at night "with no other companion than his bible and his own thoughts." For the accomplishment of this humane and wise improvement Governor Carroll is entitled to great credit, and it should be noted that this reform of our criminal code was contemporaneous with a similar and most important movement in England.

An indication of the state of public opinion is found in the different Acts against duelling which were passed under the Constitution of 1796. In 1801, in 1809, and in 1817, laws were enacted forbidding duelling and imposing severe penalties.[35]

By the Act of 1801, an "attempt to fight a duel worked a forfeiture of citizenship for one year; bear-

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[34]Journal, Tennessee House of Representatives, 1831, pages 11-12.

[35]Acts of Tennessee, 1801, chapter XXXII; Acts of Tennessee, 1809, September Session, chapter V; Acts of Tennessee, 1817, chapter LXXXIV.

ing a challenge was punished by a fine of fifty dollars and imprisonment for thirty days, without bail; accepting a challenge, by a fine of fifty dollars and forfeiture of citizenship for one year; fighting a duel in which either party was killed was declared willful murder by the survivor and punishable by death without the benefit of clergy. The Act of 1809 made it unlawful to give or receive a challenge, and punished the principal and the person bearing the challenge by depriving them of the right to hold any office or appointment of profit or honor, and of the right to give testimony in court or to serve as jurors. The Act of 1817 required all officers, civil and military, to declare on oath that they had not given or accepted a challenge or fought a duel after the eighth of November, 1817, or assisted in one, and further that they would not fight a duel or bear a challenge, or act as a second while in office. While it is true that killing in a duel had always been murder, under the common law, these statutes are extremely interesting as denoting a state of public opinion on the subject very much in advance of that which prevailed elsewhere in the United States and even in England. It will be noticed that the first of them was passed three years before public opinion in this country was so strongly aroused against duelling by the death of Alexander Hamilton at the hands of Aaron Burr.

It was during the last ten years under the Constitution of 1796 that legislation in aid of public improve-

ments began, but the subject will be discussed elsewhere.

Legislation in the interest of the public schools began, in crude form, as early as 1815, and in 1832, a fairly efficient system had been established.

The free negroes had become a source of trouble before 1834, and the subject of increasingly severe legislation. Negroes of this class were in a condition more unfortunate really, than those of their race who were in servitude. Legislation against them was not confined to the South. The northern States spared no efforts to exclude them, and their legislation gave no intimation of that sympathy for the race which finds such strenuous literary and declamatory expression in our time. The Constitution of 1796 inferentially granted free negroes limited civil rights, including the suffrage, but at an early date it was declared by the Supreme Court that the word "free men" as used in section 8 of article I, did not include free persons of color but only white persons, and that a free negro was not in the full sense of the word a citizen of the State.[36]

Later it was held that a free negro had the right to hold real estate, and to maintain action to recover possession of it when unlawfully evicted.[37]

The large influx of free negroes into Tennessee,

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[36]*State* v. *Claiborne*, Meigs' Tennessee Reports, page 331.

[37]*Winnard* v. *Robbins*, 3 Humphrey's Tennessee Reports, page 614.

produced drastic legislation upon the subject of emancipation and freed men in 1831, forbidding free negroes to remove to this State or to remain therein for twenty days, and making it an offense to do so, punishable by a fine of not less than ten, nor more than fifty dollars, and imprisonment in the penitentiary for not less than one nor more than two years.[38]

This Act of exclusion was followed two years later, by one which authorized the state Treasurer to pay the colonization society ten dollars for each free negro removed by it from this State to the "coast of Africa."[39]

Legislation upon this phase of the subject rested here until after the adoption of the Constitution of 1834.

In 1800 East Tennessee had more than two thirds of the population of the State and exercised then and for several years afterward, a controlling influence in its affairs, and the unfortunate sectional distinctions, which, strangely enough, still exist, had arisen as early as 1795. In 1810 East Tennessee had only about two-fifths of the population, and the transit of political power to Middle, or West Tennessee, as it was then called, had been demonstrated in 1809 by the election of Willie Blount, a resident of that section, to the governorship, an event which may be regarded as the

[38]Acts of Tennessee, 1831, chapter CII.
[39]Acts of Tennessee, 1833, chapter LXIV.

beginning of the political ascendency of Andrew Jackson in the State and his final triumph over his rival, John Sevier, in whom the political life of the State had centered until that time.

The year 1819 was marked by the opening of the Western district, now known as West Tennessee, to settlement, the State thus acquiring control of all the land within its limits except the Cherokee country. The census of 1830 gives the population of this western section at nearly 100,000.

An important event in the institutional history of the State was the passage of an Act in 1832 for the establishment of an asylum for the insane.

The Constitution of 1796 did not receive many important judicial constructions. In its original form as the Constitution of North Carolina, it had been interpreted by the Courts of that State upon most of the points that could create controversy under the conditions existing at the end of the 18th century and the opening of the 19th. It may be said further that it was hardly more than a collection of principles long embodied in the laws of North Carolina and repeatedly defined by provincial as well as State courts. It was the new democratic Constitutions, framed by the next generation, that gave rise to the great body of American constitutional law to be found in the court reports of the States. The jurisprudence of Tennessee did not take definite form or develop an individuality until after 1834. The Judges of the Superior and of the

Supreme Court under the first Constitution were, as a rule, well qualified, but their abilities were not often directed, by the cases before them to constructive work. The most noted among them were George W. Campbell, Hugh L. White, John Overton, John Catron, John Haywood and Nathan Green. Of these, the two who exercised most influence upon the jurisprudence of the state were Haywood and Green, but Green's work was, in the main, under the second Constitution. Haywood was indisputably the greatest jurist and the most learned lawyer in Tennessee before 1834. He had been Attorney General, and later a Judge of the Supreme Court in North Carolina, and his leadership was recognized by the bench and bar of both States. He was a monument of common law learning, but at the same time a man of pronounced individuality, and of great intellectual independence. He was on the supreme bench of Tennessee from 1812 to 1826, and did more than all the other Judges combined in shaping its decisions. That, however, was the era of land law, and not of constitutional law, and Haywood's most noteworthy, and most original opinions are those which deal with statutes of limitation as affecting land titles. Our early reports are usually, in effect, English reports, declaring the law of England, and overflowing with citations of Westminster cases.

General conditions at the time of the calling of the second convention are shown in very favorable terms in the report of a committee presented to the House of

Representatives in 1833. The population according to the census of 1830, was, whites, 535,744; slaves, 141,603; free negroes, 4,555; a total of 681,902, as against 422,665 in 1820, making an increase of about sixty-one per cent. The population in 1810 was 261,727, and in 1800, 105,602. The area of the State was estimated at 28,000,000 acres or 45,000 square miles. Annual "exports" were stated as follows; cotton, 150,000 bales at $40.00, $6,000,000.00; tobacco, 4,000 hogsheads at $30.00, $120,000.00; iron, $800,000.00; corn and live stock, $1,020,000.00; miscellaneous. $200,000.00; total, $8,140,000.00. The public debt was $500,000.00, the amount of the State's subscription to the stock of the Union Bank. The average annual expenses of government were $71,243.00, and the average revenue collected, $93,338.00, no account being taken in estimates of expenses or collection, of appropriations for common schools or internal improvements, these objects being dependent almost entirely on funds arising from the sales of lands in the Hiwassee district. It was stated by the committee that the total annual revenue to which the State was entitled, and which ought to have been collected, exclusive of school and internal improvement moneys was $122,542.00, the taxables being as follows:

17,000,000 acres granted land, (18¾c. per 100)	$31,875
84,000 slaves (25c.)	21,000
95,229 white polls (18¾c.)	17,854

Town lots	5,000
Stud horses	3,372
Pleasure carriages	1,092
Law proceedings	8,769
Conveyances	1,008
Taverns	1,110
Merchants	31,563

It is interesting to note that, judging from this estimate, the merchants bore about as large a part of the burden of the taxes as the whole 17,000,000 acres of land, and that litigation produced more revenue than all the town lots.

The value of the public lands was estimated at $500,000.00, the estimate being confined to lands subject to appropriation after the extinguishment of the Indian title, in the Cherokee country or Ocoee District. Granted lands were valued at six dollars an acre making a total value of $102,000,000.00, paying less than $32,000.00 taxes.[40]

This is an excellent showing so far as the prosperity of the State is concerned, but it demonstrates a condition as to taxation which it would seem, must have been intolerable to an intelligent and fair minded people.

The taxes while not equitably apportioned, were light, and complaints were therefore rare, especially

[40]Journal, Tennessee House of Representatives, 1833, pages 355-360.

as collections were not rigidly enforced because the treasury always had a surplus.

Tennessee was thus in 1834 a prosperous State, increasing rapidly in population and wealth, having the beginnings of an excellent public school system, able to make liberal appropriations for public improvements, possessing resources more than sufficient for its needs, keeping pace with opinion upon the subject of crime and its punishment, but having a system of government which even when administered by a man as capable as William Carroll was inefficient and in some respects positively unjust. The inefficiency was in part the result of general social conditions, which even yet were crude and unsettled, but the principal sources of trouble were the defective provisions of the Constitution in regard to taxation, the election of county officers, and the judiciary. So far as the judiciary is concerned wise legislation might have overcome the fault of the Constitution in a great measure, but in fact, unwise legislation had magnified it.

The Constitution provided that when two-thirds of the members of the Assembly should think it necessary to change the Constitution, they should recommend to the electors, at the next election, to vote for or against a Convention, and if a majority of those voting for representatives should favor a Convention, it should be called at the next session, and should con-

sist of as many members as there were in the General Assembly.[41]

At an election held in 1831, the Convention failed by over two thousand votes of receiving a majority, but the Legislature renewed its recommendation, and in 1833 a Convention was approved by the people and called by the Assembly.[42]

The conservatism of our ancestors in retaining so long the Constitution of 1796, was not more excessive than that which our own generation has shown in regard to the Constitution of 1870.

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[41]Article X, section 3.
[42]Acts of Tennessee, 1833, chapter LXXVI.

CHAPTER VIII.

THE CONSTITUTION OF 1834.

1835-1870.

The Constitutional Convention of 1834 met at Nashville on the 19th of May, and adjourned on the 30th of August of that year. The Constitution was submitted to the people on the 5th and 6th of March, 1835, and was ratified by a vote of 42,666 against 17,691. It remained in effect until the adoption of the Constitution of 1870, but was amended in 1853, in certain matters connected with the judicial department, and again in 1865 so as to abolish slavery, and to prohibit the Legislature from making laws recognizing the right of property in man. The members of the Convention were not as a rule, men of exceptional ability, and but few of them had been prominent in the public service. The best known were William B. Carter, who served three terms in Congress acceptably; Robert J. McKinney, one of the most eminent jurists the State has produced; Newton Cannon, who was Governor from 1835 to 1839; Francis B. Fogg, a lawyer of great learning and ability; West H. Humphreys, who was afterwards Attorney General and reporter for the State, United States District Judge

and Confederate States District Judge; and Willie Blount, the younger half-brother of William Blount, who had been Governor of the State from 1809 to 1815.

The Convention marked the accession of the people to power, the triumph of democracy, and the beginning of a new era of progress, of activity and of State leadership. There was nothing revolutionary, but only the culmination of a gradual and inevitable process which had been going on in Tennessee as everywhere else in America. Of the forces underlying this process, William Carroll was thoroughly representative. His first election to the Governorship in 1821 is characterized by one historian as the overthrow of the "quality," but this is a little misleading. There never was an aristocratic sentiment or class of importance in Tennessee. The State had had only four Governors before Carroll, and of those, John Sevier, who served twelve years, was essentially a man of the people, and Joseph McMinn, who served six years, was a plain farmer. Roane, who was able to secure only one term, was a lawyer and scholar, and not a man of the people, and was easily unseated by Sevier, who had given way, for two years, only because the Constitution made him ineligible for a fourth consecutive term. Willie Blount was of aristocratic antecedents, and did represent the "quality," but he was the close friend and follower of Andrew Jackson, the typical democrat. There were rich men in the State who

possessed the influence that money always gives, and there was for a time, almost a distinct office holding class, but it was what modern politicians call a "ring," rather than an aristocracy.

The retarding influences in Tennessee had been excessive conservatism, want of confidence of the people in themselves, and, in the beginning at least, inattention on the part of the majority, to affairs of government. In the phrase of our own time there was no development of civic consciousness until after the war of 1812. At that time McMinn was elected Governor, and his policy, while it was advocated with less ability, and pursued with less energy, was like Carroll's, essentially popular and progressive. McMinn was a politician, though an honest one, not a statesman, obeyed public opinion, and was in no sense a leader. His serious errors in approving a loan office to be conducted by the State under the name of a bank, and unwise and vicious laws for the protection of debtors, were concessions to a wide spread, though unreasonable, popular demand. He was the cautious advocate of internal improvements, of ameliorating the penal code, and in general, of the reforms that were accomplished during Carroll's long administration which extended from 1821 to 1835, with an intermission of two years. Carroll was a statesman, possessing foresight, and large constructive ability, and had all the qualities demanded by the times, and by the position to which he was so often elected, and it

was especially fortunate for the State that his strong and steady hand was at the helm during twelve years in which it was painfully breaking away from its 18th century institutions, and struggling into a new, freer, and better life. Carroll dominated the time, and to him, most of all is due the credit for the establishment of the new order, whose charter was the Constitution of 1834, prepared by plain but worthy men, who were genuinely representative of the people, and sincerely and unselfishly desirous of carrying out the public will which had become clearly defined on the more important questions that demanded their attention.

It may be said that the discussions that had been going on throughout the State for years afforded instructions which the Convention carried out. The result was a Constitution which was adapted to the needs of the State and thoroughly in harmony with existing conditions. The Constitution of 1796 was the outgrowth of general political conditions in America at that time, but Tennessee had then no individuality, the people were all newcomers, gathered from many quarters, and their undertaking was an experiment. In 1834 the State had existed for nearly forty years as a distinct political and social entity, had established its individuality and had developed distinctive characteristics which were embodied in the new Constitution by a Convention whose members, if wanting in brilliancy, were rich in common sense, were in thorough accord with the plain people, and were

strenuously faithful to their trust. The Convention gave the people what they demanded, and neither its purposes nor its plain and honest methods, can be too highly commended. The Constitution of 1834 was the people's Constitution, and for that time, and for the next generation, it was excellent. Probably its gravest defect was its excessive length, which was caused by the introduction of provisions that properly belonged on the statute books and not in the organic law. The Convention, while fully alive to the necessity for extensive revision, was not iconoclastic, but thoroughly conservative. President Carter, on taking the chair, said among other things: "The great principle which should actuate each individual in this Convention, is to touch the Constitution with a cautious and circumspect hand," and this spirit pervaded the proceedings, except in a few instances, and determined results in every instance. Probably Willie Blount was the most idealistic and radical member, but certain complicated and experimental additions which he proposed were rejected promptly.

As soon as the Convention had been organized, it was flooded with resolutions, varying in form but of striking similarity in substance. The principal subjects were, the obnoxious tax clause of the old Constitution, the property qualifications, the judiciary, the selection of officers, special legislation, the election of members of the Assembly to other offices, lotteries, and emacipation. These resolutions are an index to

the public mind on the subject of Constitutional revision. There was another matter which consumed more of the time of the Convention than any of these, and that was the establishment of new counties, a subject which was important on account of the rapid increase of population, the largeness of the old counties, and the complications that changes invariably produced. After the adoption of the Constitution there were many unsuccessful attempts to amend it in this respect for the benefit of particular localities.

The more important amendments of the Constitution by the Convention will be described as briefly as possible.

The preamble was lengthened by a proper historical statement, and concluded with a recommendation of the Constitution to the people for their adoption.

The declaration of rights was made the first, instead of the last article of the Constitution, and the first important change in it was the removal of the limitation to its own citizens of the right to sue the State.[1]

Section 26 of this article in the old Constitution declared that all free men had the right to bear arms, but in the new one the right was extended only to free white men. The section setting out the boundaries of the State was amended so as to cover all lands that the State might acquire beyond the limits designated. By a change in the wording of section 19, prosecutions

[1]Article I, section 17.

for libel were put on the same footing as other criminal cases.

The Constitution itself begins with the emphatic declaration that the powers of government shall be divided into three distinct departments, the legislative, the executive, and the judicial, and that no one belonging to either of these shall exercise any powers belonging to the others. Thus, at last, the judiciary became by constitutional intent, independent of the Legislature. The General Assembly remained as already established, but the property qualification for membership in either house was removed, and the apportionment of members of both was according to the number of qualified voters, and not the "taxable inhabitants." The inhibition of the old Constitution upon the subject of electing members of the Legislature to other offices was continued in the following words: "No Senator or Representative shall, during the time for which he was elected, be eligible to any office or place of trust, the appointment to which is vested in the executive or General Assembly, except to the office of Trustee of a literary institution." [2]

The word executive was introduced here with a view to certain new powers of appointment conferred on that department.

The Constitution of 1796 directed that the "yeas and nays" be recorded in either house of the Assembly, on any question at the request of two members,

[2]Article II, section 10.

and this was changed so as to require the "yeas and nays" to be taken on the final passage of all general and appropriation bills, and to be recorded on any question upon the application of two members.

The compensation of the members of the first Assembly under the new Constitution was fixed at four dollars a day, with the same amount for every twenty-four miles traveled, to which there was vigorous objection, two members entering a solemn protest in which they affirmed that the amount was "vastly greater than is allowed to other members of the community for services equally meritorious." [3]

Soldiers, the protest declared, risked their lives for eight or ten dollars a month, while "a member of the Legislature who sits in a comfortable apartment, and spends six or seven hours each day, in talking about matters and things in general, while at the same time he is enjoying all the comforts and luxuries of life, takes (being his own pay-master), one hundred and twenty dollars a month out of the public treasury for his services." The suspicion of demagogy which this excites is allayed somewhat by the showing made in the protest that the compensation was larger than that allowed in many States, as for instance in the "great State of New York" where the legislators received only three dollars a day. This protest is of interest because it disapproves frequent sessions of the As-

[3] Journal, Constitutional Convention, 1834, page 357.

sembly and insists that triennial meetings of limited duration would be sufficient.[4]

This last opinion is in accord with the steadily growing sentiment of our own time. That the Legislature of Tennessee meets too often, the sessions still being biennial, no one who has watched the course of legislation will deny.

The Convention wisely decided that it would be well to have a statement of receipts and disbursements of public moneys published with the laws "at the rise of each stated session of the General Assembly."

The subject of taxation was one of the storm centres of the Convention and it is pleasing to observe the steady prevalence of common sense and justice through long and fiery debate and in the midst of resolutions confusing in number and variety. The provision as finally constructed was in all respects sound and just, considered with reference to prevailing conditions, and embodied the most enlightened opinion of the time. It was as follows; "All lands liable to taxation, held by deed, grant or entry, town lots, bank stock, slaves between the ages of twelve and fifty years, and such other property as the Legislature may from time to time deem expedient, shall be taxable. All property shall be taxed according to its value; that value to be ascertained in such manner as the Legislature shall direct so that the same shall be equal

[4]Journal, Constitutional Convention, 1834, pages 358-359.

and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value, but the Legislature shall have power to tax merchants, peddlers and privileges in such manner as they may from time to time direct. A tax on white polls shall be laid in such manner and of such an amount as may be prescribed by law. The General Assembly shall have power to authorize the several counties and incorporated towns in this State to impose taxes for county and corporation purposes respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value upon the principles established in regard to State taxation." [5]

A comparison of the primitive, arbitrary, and unwise provisions for taxation in the Constitution of 1796, with these well considered and equitable regulations, reveals in outline the commercial and industrial history of the State during the period between the two Conventions. The law of 1796 shows upon its face that it was established by a frontier community whose principal source of revenue was large areas of cheap, unimproved land, together with a few town lots, slaves, and brood horses, and that it was prepared by men inexperienced in State making. The law of 1834, taxing not only lands and slaves, but, in effect, every other species of property, and also privileges,

[5] Article II, sections 28-29.

shows an extraordinary growth of that society. The back-woods settlements have grown into an industrial and commercial community wherein all the vocations of civilized life are carried on, and incorporated towns have come to be of sufficient extent and importance to be endowed with the power of self taxation; the public mind has been enlarged and disciplined, and the Constitution makers have a correct conception of the larger principles of taxation. The second Constitution recognizes and enforces uniformity and equality as the basis of all just taxation, and does not, like its predecessor, declare equality and establish inequality.

In its time it was a thoroughly good Constitution, and the twenty-five years next after its adoption were the golden age in the State's history, for great as its progress had been, Tennessee was not yet well populated or highly organized; there were no railroads, and no cities worthy of the name, and there is proof of simple and crude conditions in the fact that "pedlars" were still of sufficient importance in the community to be mentioned in the Constitution.

The Convention experienced no little difficulty in getting rid of the town lot as a distinct object of taxation, and certain members were strongly averse to taxing improvements, and especially dwellings upon lands of any kind. As late as the 29th of July, a resolution exempting from taxation dwelling houses and improvements made upon any lands or town lots,

except in county seats or incorporated towns, received twelve votes.[6]

It was proposed also that all lands be divided for taxation, into three or more classes, but the section as quoted was finally adopted by a three-fourths vote.

The third article of the Constitution dealt with the executive, vesting the chief executive power in the Governor who was to be chosen by the people for a term of two years, not to be eligible for more than six years in any term of eight. No property qualification was required, the only condition being that the candidate should be thirty years of age, a citizen of the United States, and citizen of the State for seven years. The succession to the governorship remained in the speaker of the Senate, although an effort was made to create the office of Lieutenant Governor.[7]

Article four dealt with the suffrage, and whereas the old Constitution allowed every free man with certain qualifications to be a voter, the right was now confined to free white men, citizens of the United States, and citizens for six months of the county. There was a proviso, however, that no one should be disqualified on account of color, who was, under existing laws, a competent witness in a court of justice against a white man, that is to say, all negroes, Indians, and persons descended from negro or Indian ancestors to the third generation were excluded. At

[6]Journal, Constitutional Convention, 1834, pages 195-196.

[7]Journal, Constitutional Convention, 1834, page 83.

the same time it was provided that free negroes should be exempt from military duty in time of peace, and from payment of the free poll tax. Elections in the General Assembly were to be *viva voce,* and all others by ballot.

Article four as originally agreed upon by "the committee of the whole house did not deprive free negroes of the suffrage, but did contain the experimental provision that all elections should be *viva voce.*[8]

The Constitution of 1796 made the Governor and all civil officers liable to impeachment, but by Art. V. of 1834, only the Governor, the Judges, Attorneys for the State, and the Secretary of State were subject to impeachment, while justices of the peace and other minor civil officers were to be indicted for misdemeanors in office, and if convicted were to be removed from office as if impeached, and be subject to such other punishment as the law might prescribe.

On the important, and long discussed subject of the judiciary the new Constitution declared that; "the judicial power of this State shall be vested in one Supreme Court, in such inferior courts as the Legislature shall from time to time ordain and establish, and the Judges thereof, and in Justices of the Peace."

It is astonishing to find that Newton Cannon, one of the leading members of the Convention, moved, as an amendment, to restore the corresponding clause,

[8]Journal, Constitutional Convention, 1834, page 171, where it appears as Article III.

of the old Constitution and that nineteen other members supported his motion.[9]

The Supreme Court was composed of three Judges, one from each grand division of the State, to have only appellate jurisdiction, and to be held at only one place annually in each division. No provision was made for a chief justice.

Judges of the Supreme Court were elected by joint vote of both houses for a term of twelve years, and were required to be thirty-five years of age, while those of the inferior courts served eight years and were required to be only thirty years of age.

The Supreme Court had decided that, under the Constitution of 1796, an Act authorizing the Governor to appoint a special Circuit Judge in case of temporary disability of the incumbent, was invalid because the Constitution prescribed another mode for the selection of Judges,[10] and provision was now made for general laws authorizing the appointment of special Judges.

Attorneys for the state were elected by the Assembly for a term of six years.

At this point a provision was introduced into the Constitution which was retained in 1870, and which in recent years has been made strikingly effective. Its purport is that Judges and Attorneys for the State may be removed from office by a concurrent vote of

[9]Journal, Constitutional Convention, 1834, page 220.

[10]*Smith* v. *Normant*, 5 Yerger's Tennessee Reports, page 271.

both houses of the General Assembly, each house voting separately, the concurrence of two-thirds of all the members of each being required. This is distinct from the provision for impeachment.[11]

The compensation of the Judges and the jurisdiction of the inferior courts were to be fixed by the Legislature from time to time.

The Supreme Court appointed its own clerks for a term of six years, and the Chancellors their clerks and masters for the same time, while clerks of other inferior courts were elected by the voters in each county for four years.

Section fifteen of Article VI directed that each county be laid off as the General Assembly might direct, into districts of convenient size so that the whole number in any county should not exceed twenty-five, or four for every one hundred square miles, each district to elect two justices of the peace, and one constable, except county towns, which were allowed three justices and two constables. The justices served six years and constables two years, and both had jurisdiction co-extensive with the county.

In the earlier deliberations of the Convention it seemed to be taken for granted that the justices would still be chosen from the captain's companies, but on the 18th of July, a committee previously appointed, reported in favor of the plan finally adopted. This report, after sharply criticising the existing arrange-

[11]Article VI, section 6.

ment said; "How the custom of blending the civil and military divisions of our government originated, in effect making the former in some degree dependent on the latter, the committee are at a loss to know, and can only account for it from the situation in which our country was placed in its early settlement, when its preservation and welfare required that military districts should be established before it was convenient to arrange the civil divisions." Certain of Mr. Jefferson's remarks on township government are then quoted as having influenced the action of the committee.[12]

Not only were justices of the peace elected by the people instead of by the Legislature, but the County Court gave way to the people in the election of sheriffs, registers, and trustees, and the term of registers was fixed at four years instead of "during good behavior." The coroner and the ranger continued to be elected by the County Court.

The Legislature was authorized to provide for filling all vacancies in offices except as otherwise directed in the Constitution.

Popular elections were to begin and end on the same day, instead of continuing a day and a half

[12]Journal, Constitutional Convention, 1834, page 143. I have been unable to trace the Captain's Company as a civil division, beyond the territorial government, though I find that in 1784, a statute of North Carolina, assigned certain duties to justices of the peace according to Captain's Districts; see Acts of North Carolina, 1784, chapter I.

as formerly, although the ordinance appended to the Constitution authorized the election for passing upon that instrument to be held according to the old law. Ministers of the Gospel and Priests were still excluded from the Assembly, and persons who denied the being of God, and a future state of rewards and punishments, were still denied office in the civil department.

The anti-duelling laws referred to in the preceding chapter were now carried into the Constitution in the form of an article declaring that whoever, after the adoption of the Constitution, should fight a duel, or knowingly, be the bearer of a challenge, or send or accept a challenge, or be an aider or abettor in fighting a duel, should be deprived of the right to hold any office of honor or profit in the State, and should be otherwise punished as the Legislature should prescribe.[13]

The provision was not original, as duelling had been prohibited by the Mississippi Constitution of 1817, the Connecticut and Illinois Constitutions of 1818, the Alabama Constitution of 1819, and the Virginia Constitution of 1830. Eventually the inhibition appeared in some form in the Constitutions of not less than twenty-eight States.

Very complicated provisions were made for, or rather against, amending the Constitution. Proposals for amendment might originate in either house of the Assembly, and if agreed upon by a majority of all

[13]Article IX, section 3.

the members of each house, were to be entered upon the journals, and referred to the next General Assembly, and published for six months before the election of that body. In the second Assembly, the concurrence of two-thirds of the members of each house was required, and, this being given, the amendment might be submitted to the people, and adopted by the approval of a majority of all the citizens of the State voting for representatives. It was hardly necessary to add a clause prohibiting the Legislature from attempting this tremendous process oftener than once in six years.[14]

The Legislature was deprived of the power to grant divorces, but since that time, has vindicated its authority by multiplying causes for divorce. In the matter of lotteries, the Constitution not only deprived the Legislature of the powers it had previously exercised, but required it to pass laws prohibiting the sale of lottery tickets within the State. Private lotteries had been prohibited in 1809, and in a case decided in 1829 the Supreme Court, speaking through Judge Catron, declared lotteries to be "odious gambling." [15]

In 1829 it was made a misdemeanor to sell tickets in any lottery not authorized by the laws of the State or of the United States.[16]

It appears that lotteries continued to be allowed

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[14]Article XI, section 3.

[15]Acts of Tennessee, 1809, chapter XXXIX; *State* v. *Smith*, 2 Yerger's Tennessee Reports, page 283.

[16]Acts of Tennessee, 1829, chapter XXIII.

freely up to 1834, by Acts of the Legislature in special cases of individual misfortune, and for such purposes as building bridges and academies.[17]

The Legislature was directed to pass laws fixing a rate of interest in the State and was prohibited from suspending any general laws for the benefit of a particular individual, or granting special privileges or immunities to individuals, "other than such as may be by the same law, extended to any member of the community who may be able to bring himself within the provisions of such law." [18]

Authority to create corporations was conferred expressly upon the Legislature.

Section eight of article XI was intended to prevent special and local legislation, as it conferred upon the Legislature the right to "vest such powers in the courts of justice with regard to private and local affairs as may be deemed expedient."

A most important addition to the Constitution was section 9 of article XI which declared that: "A well regulated system of internal improvement is calculated to develop the resources of the State and promote the happiness and prosperity of her citizens, therefore, it ought to be encouraged by the General Assembly."

This section made much history which will be related in the chapter below on "Internal Improvements and the State Debt."

[17]Journal, Constitutional Convention, 1834, page 159, Report of Committee.

[18]Article XI, sections 6 and 7.

The leading advocate of internal improvements was former Governor, Willie Blount, who as chairman of a committee, presented an elaborate and remarkable report. It will relieve the dullness of this recital, and at the same time, show the condition of opinion on this subject in the Convention, and not less among the people, in 1834, to quote one of Governor Blount's glowing sentences.

"Whereas the geographical position of Tennessee, in reference to the other States of the Union, she being central, and whereby she is everywhere separated at a great distance from the national frontier; a situation affording a peculiarly favorable position for usefulness; a position which gives her population and her citizen soldiers the enviable character of disposable force with the glorious privilege of being permitted, in a state of war, to fly to the succor of whatever part of the national frontier may be the theatre of war, and to co-operate in the national defense with whatever sister state or territory may be assailed by an invading foe—thereby demonstrating to the world the hitherto doubtful political problem, that freemen know how to appreciate equally the kindred privileges and duties of self government and self (or national) defense, privileges and duties equally essential to the efficient maintenance of our republican institutions and our national independence; privileges and duties, in the vigorous exercise and discharge of which, we may contribute to prove to a hitherto doubting, and a

future admiring world, that the freest and happiest of republics may be, in war, the most powerful and invulnerable of nations." [19]

This is the first and not the longest sentence in the report, and has reference, obviously, to the time when Tennessee had availed herself promptly of the privilege of flying to the succor of the National frontier in the Creek War, at which time Blount was Governor, and displayed great energy and ability. Internal improvements was the phrase of the time with politicians and people alike.

The great work of the Convention was done in behalf of education. In section 10 of article XI, it was affirmed that "knowledge, learning and virtue" are essential to the preservation of republican institutions, and therefore it was made the duty of the General Assembly "in all future periods of this government to cherish literature and science," and it was ordained that the common school fund then in existence, and as thereafter increased, should remain a perpetual fund, the principal of which should never be decreased by legislative appropriation, and the interest upon which should be "inviolably" appropriated to the support of the common schools.

The section further ordered that certain specified funds, when received by the State, should be appropriated to the purposes of education and internal improvements.

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[19] Journal, Constitutional Convention, 1834, page 345.

When the Convention of 1834 met the Legislature had been peripatetic for a number of years. The Constitution of 1796 had made Knoxville the Capital until 1802, and after that time the Legislature had met at Knoxville, Nashville, and Murfreesboro, and for part of a day, at Kingston. The Constitution of 1834, devolved upon the Legislature the invidious duty of selecting a permanent Capital, directing in the schedule that the choice be made within the first week of the session of 1843, that being the first Assembly to be elected under the apportionment of representation made in the Constitution. The result was the selection, very properly, of the city of Nashville.

Several attempts were made to have the Convention designate the Capital, and nearly all the larger towns of Middle Tennessee from McMinnville westward were proposed. The Convention, however, evaded the question, declining even to select the "center of gravity" of the State, which was obviously the proper place for the center of government, although that interesting point had been located by a learned professor of mathematics. It is of interest that the professor declared the center of position and the center of gravity to be identical, and fixed the point one and a half miles east of Murfreesboro.[20]

The Convention at an early period in its deliberations manifested its purpose to submit the Constitution to the people, but upon that subject it was not

[20]Journal, Constitutional Convention, 1834, pages 61-62.

entirely consistent. It was known that the free negro voters, about one thousand in number, would oppose the Constitution, and therefore in the ordinance attached to it, the right to vote in the election to ratify or reject, was confined to qualified electors under the first section of the fourth article of the amended instrument, which, as we have seen, included only free white men. The scheme was original, practical, and effective, the Convention allowing nearly all the people to vote upon the Constitution, thus approving and harmonizing the two ordinarily antagonistic theories of the powers of Constitutional Conventions. If the Constitution had not been ratified, the freedmen would have been disfranchised for only one election.

In one respect only did the Convention of 1834 fail to make the Constitution sufficiently democratic to meet the wishes of the people, and that was in allowing the Legislature to elect Judges, and the Attorneys for the State. There was disapproval of this in the Convention and among the people, and the sentiment became effective in 1853 in the adoption of the amendments transferring the election of all Judges to the people, fixing their term of office at eight years, and making the Attorneys for the State and the districts elective in the same manner for terms of six years. These amendments, at last, made the Constitution thoroughly democratic, in all its parts, according to the opinion of that time.

CHAPTER IX.

THE CONSTITUTION OF 1834—Continued.

1835-1870.

The journal of the Convention of 1834 is of great interest and value, revealing as it does, the state of popular opinion upon almost every conceivable public question of importance. Every section of the revised Constitution seems to have been considered, discussed, and voted upon, at least, three times. This method resulted in a session of three months, and allowed the members the fullest opportunity for deliberating and for revising their work.

Among the more interesting matters considered was emancipation. The slavery question did not become one of paramount importance in federal politics until about the year 1849, but, in 1831, an insurrection of negroes in Virginia had caused great public excitement and in 1832 an anti-slavery convention had been held in Philadelphia. During the sitting of the Convention of 1834, opposition to the abolitionists produced serious outbreaks of disorder in the city of New York, and Garrison was at that time just entering upon his strenuous career as an agitator.

In Tennessee, emancipation societies had been organized as early as 1809.[1]

In 1819, Elihu Embree had begun the publication of his anti-slavery paper, " The Manumission Intelligence," at Jonesboro, and in 1822, Benjamin Lundy seems to have found Tennessee better adapted than Ohio to the propagation of abolition sentiment, for in that year he removed from Ohio to Greeneville, Tennessee, where he established the "Genius of Universal Emancipation," a publication whose title avoids any doubt of its purpose.[2]

In certain instances the Legislation of North Carolina before the cession, and of Tennessee after that event, had been antagonistic to slave traders. In the year before the meeting of the Federal Convention, North Carolina imposed a heavy duty on the importation of slaves, and made it unlawful to import them from free States.[3]

In 1812, and in 1826, Tennessee forbade the importation of slaves to be sold as merchandise.[4]

During the first three decades of the 19th century the Quakers and the Presbyterians were relatively more numerous and influential in Tennessee than afterwards, and were, usually, pronounced opponents

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[1]Letter of the late John Caldwell, of Jefferson county, Tennessee, now in the writer's possession.

[2]"East Tennessee and the Civil War," by O. P. Temple, pages 91-92.

[3]Acts of North Carolina, 1786, chapter V.

[4]Acts of Tennessee, 1812, chapter LXXXVIII; Acts of Tennessee, 1826, chapter XXII.

of slavery, and the higher tribunals of the rapidly growing Methodist church held and declared the same opinions. Thus, while there had been up to this time, no definite movement of serious import, against slavery in Tennessee, there existed a strong body of opinion against it, and there was every reason why the Convention should have expected to have the subject brought to its attention. At all events it was presented promptly, on the 24th of May, the 6th day of the Convention, when Mr. Cahal introduced a petition of sundry citizens of Maury county, in Middle Tennessee, on the subject of emancipation.[5]

From that time the journal abounds in references to emancipation and slavery. On the 18th of June, Willie Blount submitted a resolution providing that the Legislature should have no power or authority to pass laws for the emancipation of slaves without the consent of their owners, and without paying to the owners previous to such emancipation a full equivalent: and that on the general subject of emancipation it should have no power whatever.[6]

On the 19th of June, a committee, which had been appointed at an earlier date for the purpose of formulating the reasons that actuated the Convention in declining to consider memorials on the subject of emancipation, presented a long and eloquent report, covering more than six closely printed pages.[7]

[5]Journal, Constitutional Convention, 1834, page 26.
[6]Journal, Constitutional Convention, 1834, page 85.
[7]Journal, Constitutional Convention, 1834, page 87.

In the beginning it was a severe arraignment of slavery, declaring that, "the committee does not understand the Convention as denying the truth of the proposition which asserts that slavery is an evil; to prove it to be a great evil is an easy task, but to tell how that evil may be removed is a question which the wisest heads and most benevolent hearts have been unable to answer in a satisfactory manner." The second sentence admits that "fleecy locks and a black complexion mark every one of the African race, and so long as he remains among white men, he is a person doomed to dwell in the suburbs of society." Again, it is said, "but the friends of humanity need not despair; the memorialists need not dread that slavery will be perpetual in our highly favored country; Providence has already opened the door of hope which is every day opening wider and wider. On the coast of Africa, the foundation of a mighty empire is already laid, and thither the sons and daughters of Africa, made free by the sons of their masters, and transported by the funds furnished by the benevolent, shall repair, and carrying with them the blessings of civilization, and the truths and consolations of christianity, they will in process of time, banish idolatry, ignorance, and superstition from that wretched land which has been so long the habitation of horrid cruelties." The committee declared that the last thirty years had produced a great change in public sentiment upon the subject of slavery, and that it was not to be

doubted that the next thirty years would produce a still greater one, a prediction that was strikingly fulfilled. Referring to the abolitionists the committee said, "If misguided fanatics in those parts of the United States where slavery does not exist, will only refrain from intermeddling in a matter in which they have no concern, and in which their interference can do no possible good, and may do much positive evil, slavery with all its ills will be extinguished as certainly and as speedily as the friends of humanity have any reason to expect. In conclusion it declared that "A premature attempt on the part of the benevolent to get rid of the evil of slavery would certainly have the effect of postponing to a far distant day the accomplishment of an event devoutly and ardently desired by the wise and good in every part of our beloved country.[8]

But while the report thus declared slavery to be a great evil, and abolition an event ardently desired by the wise and good, it advised against interference with the institution on the ground of inexpediency, and on account of the injury which it affirmed would result necessarily to the negroes. It would be impossible to believe that sentiments so antagonistic to slavery were expressed in this Convention if we were unmindful of the fact that the agitation, of the subject, in politics, had only begun in the North, and had not yet extended to the South, and that there had been no

[8]Journal, Constitutional Convention, 1834, page 93.

incentive to find arguments in support of the institution. When this report was put to a vote it was carried by forty-four against ten.[9]

The negative voters were Hugh. C. Armstrong, representing Overton and Fentress Counties, which are in Middle Tennessee, although the last named is contiguous to East Tennessee; Richard Bradshaw, Bradley Kimbrough, Robert J. McKinney, John M. M'Gaughey, and Matthew Stephenson of East Tennessee, and Joseph Kincaid of Middle Tennessee. It will be seen thus that the opposition was almost entirely from the eastern portion of the State. Among the negative voters, the only man of real prominence was Robert J. McKinney, a native of Ireland, who, in all probability, was the ablest man in the Convention. The action on this report was one of expediency, and the ten members who voted in the negative constituted the uncompromising radical element, several of whom insisted upon entering protests declaring the action of the Convention to be opposed to the spirit of the gospel, an apology for slavery, and otherwise wrong.[10]

There is no room to doubt that as an original proposition, the sentiment of the Convention was opposed to slavery. The memorials which gave it so much trouble were not produced by any general or

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[9]Journal, Constitutional Convention, 1834, page 100.

[10]Journal, Constitutional Convention, 1834, pages 104, 147, 223.

concerted movement, and the number of signers was insignificant. The Chairman of the committee, resenting the criticisms contained in the several protests, made an additional report at a later date, vigorously defending his committee and re-arguing the question.[11]

From this last report it appears that memorials had been presented from the following counties: Washington, Greene, Jefferson, Cocke, Sevier, Blount, McMinn, Monroe, Knox, Rhea, Roane, Overton, Bedford, Lincoln, Maury and Robertson. The number of signers in Washington was 273; in Greene, 378; in Maury, 33; in Overton, 68; in Robertson, 24; in Lincoln, 105; in Bedford, 139. The signers of each of the remaining petitions represented more than one county so that no distinction could be made. The total number of memorialists was 1804, of whom one hundred and five declared themselves slaveholders, and it is possible that there were other slaveholders who did not so designate themselves.[12]

Of the sixteen counties represented by the memorialists eleven were in East Tennessee, and five in Middle Tennessee. More than one-third of the signers resided in the counties of Washington and Greene in East Tennessee, the counties in which the papers of Embree and Lundy had been published.

It is apparent that there was nothing of the nature

[11]Journal, Constitutional Convention, 1834, page 125.
[12]Journal, Constitutional Convention, 1834, page 125.

of a popular uprising and no demand of sufficient proportions to impress itself strongly upon the Convention, and therefore, the sentiments of that body against slavery must have existed in the minds of the members, without regard to these memorials.

A few years later, mention of the subject in such a forum would have provoked the bitterest controversy, and opinions such as were expressed in the report certainly would not have been endorsed as they were in this instance.

The plans proposed by the memorials were interesting and as a rule, impracticable. It appears that Washington county was "almost the only one" that did not submit a definite plan. Of the remaining thirty petitions, about one-half asked that all the children of slaves in this State, born after 1835, be made free, and that all slaves be made free in 1855, and sent out of the State. The others prayed that all slaves be freed in the year 1866 and colonized. Forty-six counties presented no memorials.[13]

Legislation in Tennessee as it stood at the outbreak of the war between the States represented a constantly increasing determination to rid the State of free negroes as far as possible. Slaves could be emancipated upon the application of the owner, and in cases of bequest of freedom, on the application of the personal representative of the testator or, if he refused, on application of the slave himself, by next friend; and even

[13]Journal, Constitutional Convention, 1834, page 126.

the court, whose assent was required in every case, could not consent to the emancipation except upon condition of the immediate removal of the emancipated slave from the State. This condition was made part of the decree, and the applicant was required to guarantee the removal by a bond, in a penalty equal to the value of the slave. Finally, the law provided for the transportation to the west coast of Africa of "all slaves having the right of freedom, but not emancipated by the courts; of all slaves who should acquire the right to freedom by contract or will; of those who should sue for a recovery of freedom, and of free negroes allowed to remain in the State, on condition of giving bond, who had not given such bond. Elaborate provisions were made for raising the money necessary to defray the expenses of transportation, and for providing the transported with money sufficient to support them six months in Africa.[14]

These statutes were severe, but they were not exceptional at that time. There was no State north or south, which did not object to receiving and retaining free negroes, and the Tennessee laws only expressed a sentiment which prevailed throughout the States with almost equal intensity.

The Convention probably was moved by a sense of equity to insert a clause recognizing the existence of grand divisions of the State, and requiring one Judge of the Supreme Court to be taken from each

[14]Code of Tennessee, 1858, sections 2692-2709.

of them, but it is submitted, that the policy was altogether bad. It may be that sectional divisions in sentiment would have resulted naturally from the geographical peculiarities of the State, but as they cannot be regarded otherwise than as unfortunate and injurious, no recognition of them in the Constitution or laws of the State can be justified. Divisional feeling was first manifest when Cumberland failed to espouse the cause of Franklin, and again when it voted against statehood in 1795, and was accentuated as population increased, and East Tennessee reluctantly yielded its primacy in State affairs. Institutionally the division began with the creation of judicial districts, and before the era of railroads there was justification on the ground of convenience, but the plan is retained in our present Constitution and has strengthened and confirmed sectional jealousies which ought to have disappeared long ago. A change is improbable, and might at this late day do no good, but genuine state pride and patriotism must condemn the policy.

The County Courts were discussed in the Convention, but a resolution depriving them of judicial powers, and making them purely administrative bodies, was not approved. It was proposed that the office of Comptroller of the Treasury be created, but this likewise failed, and the office was established soon thereafter by the Legislature.

Willie Blount would have established a Council of State, similar to the one provided for in the rejected

Houston Constitution for the State of Franklin, a body which was to have periodically, the most extraordinary inquisitorial and supervisory powers, but the most earnest and eloquent argument failed to convince the Convention of the necessity or the expediency of creating such a tribunal.

After the adoption of the Constitution of 1834, there was no further discontent with the judicial system. The Supreme Court was now composed of three Judges, and in the period extending from 1834 to 1861, these Judges were, without exception, men of the highest character, and, usually, of great ability and learning. The lawyers of the State have a just and proper pride in the jurisprudence of Tennessee as established by this Supreme Court, and contained in the reports from 9th Humphreys to 1st Coldwell, inclusive. The decisions to be found in these reports are invariably well considered, just, and learned, of excellent literary quality, and consistent with each other. They are the body of the jurisprudence of Tennessee, sound in quality, fair in proportions, and altogether admirable.

The Supreme Court under the Constitution of 1796, rendered invaluable service in giving form to the land law of the State, which was in that time the subject of first importance in litigation, and in adjusting the laws inherited from North Carolina, and from England, to the new conditions, but its work is inferior in importance, and, usually, in quality, to that

of the court under the second Constitution. The new court came into existence when the State was well entered upon a period of extraordinary industrial and commercial expansion, when banks were being established, and corporations of every kind were multiplying, and the increase of population was creating diversity of pursuits, and giving rise to many new questions of law.

The State had begun a new life and was fortunate in having a court whose ability was equal to the demands that were made upon it.

Equity jurisprudence became of especial importance, as the inadequacy and frequent injustice of the common law as applied to the concerns of a modern democratic community were demonstrated. With the admirable work done by the Supreme Court in this respect the name of judge Nathan Green has been most prominently connected. Not less creditable was the work of the Court on other lines. The opinions of William B. Reese, and William B. Turley are as fine specimens of judicial literature as are to be found in the American or English reports. Robert L. Caruthers possessed perhaps, equal abilities as an opinion writer, but did not so often employ them. Robert J. McKinney was a man of most incisive intellect and sound judgment, whose opinions were marked by brevity and perspicuity, rather than by learning or superior literary form, while knowledge of the law and the plain and practical method in which

he employed it, entitle Archibald Wright to a place beside the great Judges who have been named.

The Circuit and Chancery Courts speedily acquired and deserved the unqualified respect and confidence of the bar and of the people.

The period was marked by a number of well conducted undertakings to systemize the laws of the State and the procedure of the courts. There were compilations of the statutes by George Roulstone, and by Judge Haywood before 1820, and in 1821, Edward Scott, of the Knoxville bar, published a revisal of the State statutes, and of the North Carolina Acts in force in Tennessee. This last was an excellent book, but was a republication, and not a code or digest. In 1825, the Legislature directed that a digest and revision of the statutes be prepared, and the work was assigned to Judge John Haywood and Robert L. Cobbs. Haywood died before it was completed and Cobbs finished it, and submitted it to the Legislature in 1827. Publication was delayed for some years, for various reasons, and finally the work was extended so as to include the Acts of 1829, and was completed by James A. Whitesides, and published in 1831. In 1836 appeared the compilation of Caruthers and Nicholson, and in 1846, a supplement prepared by A. O. P. Nicholson. In 1858 appeared the code of Tennessee, prepared, under the authority of the Legislature, by Return J Meigs and William F. Cooper, in not very harmonious collaboration. By the work

of a committee of the Legislature, of which Joseph B. Heiskell was chairman, the results of the work of Cooper and Meigs were combined very satisfactorily. The Legislature, with conscientious care, and patience, passed the code as a statute, and declared it the "body of the public statutes" of the State. It is the only official code of Tennessee at the present time, although for actual use, it has been supplanted by later and valuable, though unofficial compilations, all of which are extensions of it without any change of plan. The degree of confidence imposed in Messrs. Cooper and Meigs will appear from the fact that they not only revised the statutes of Tennessee, but were allowed to include with them, at their discretion, parts of the statutes or codes of other States, which thus became law in Tennessee.

In 1831, the Legislature created the office of State Reporter, and in 1835, the Attorney General for the State was made Reporter.[15]

The law literature of the State was greatly enriched in 1848 by a digest of all the decisions of the Superior and Supreme Courts, prepared by Return J. Meigs, one of the makers of the Code. No lawyer can speak of this book except in terms of highest praise. In it, cases are digested with invariable accuracy and perspicuity and in the most felicitous arrangement. No better book for lawyers can be found anywhere, but

[15]Acts of Tennessee, 1831, chapter LII; Acts of Tennessee, 1835, chapter LI.

it has merits far beyond its value to the practitioner. It systematizes the whole body of the reported law of the State and presents to the student an accurate view of the history and development of our jurisprudence. It abounds in references to standard works of history, and to English statutes and cases as explanatory of our own Acts and decisions, and is an admirable institutional history of the State, as well as an absolutely trustworthy digest of our decisions.

About 1847, Judge Abraham Caruthers, of the Lebanon law school, published a pamphlet on common law procedure in Tennessee, which grew into the "History of a Law Suit" a volume which for more than forty years has been the chief reliance of law students, and at the same time, an accepted authority in the highest courts of the State. It is a learned and perspicuous treatise upon common law practice with special reference, in its final form, to the Code of Tennessee, but by no means limited in usefulness to this State, and doubtless suggested the preparation of "Gibson's Suits in Chancery," a book of greater merit and value in its own department, which appeared forty years later. But it was not only the courts and the lawyers that were progressing. In 1844, appropriations were made for establishing a school for the blind at Nashville, and for the deaf and dumb at Knoxville,[16] and these institutions speedily attained

[16]Acts of Tennessee, 1843-4, chapter CLXLV.

a high degree of usefulness, and have been uniformly well conducted.

The fiscal branch of the State government was improved in 1835, as we have seen, by the creation of the important office of Comptroller of the Treasury.

In 1831, the State granted its first charter to a railroad company,[17] and in 1834 the first work of railroad construction in the State was done upon the line of the Hiwassee Railroad, which afterwards became the East Tennessee and Georgia Railroad, and is now a part of the system of the Southern Railway Company. When the war between the States began, no State in the south was better equipped with railroads than Tennessee.

In 1840, Tennessee produced more Indian corn than any other state in the Union, was third in the production of tobacco, and sixth in the production of wheat, and this relative position did not vary greatly during the succeeding twenty years.

The development of the rich coal deposits in East Tennessee and on the Cumberland plateau, began as early as 1840, and progressed satisfactorily despite the want of adequate facilities for transportation. The beginning of the marble industry, one of the chief sources of wealth in East Tennessee may be assigned to the year 1838.[18]

The Journals of the Territorial Assembly show that

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[17]Phelan's History of Tennessee, page 284.
[18]Goodspeed's History of Tennessee, page 267.

the mining and manufacturing of iron began in Tennessee in the 18th century, and in 1856 there were seventy-one furnaces and four rolling mills in the State.[19]

At the risk of exceeding the proper limits of this work, an outline of the larger facts of the State's political history will be presented at this point as an aid to understanding the course of constitutional development.

Such a discussion is more appropriate here than elsewhere, because the most interesting and the most important period in our political history comprises the ten years immediately preceding the adoption of the second Constitution, and the fifteen years succeeding that event. One historian of the State declares that from 1830 to 1850, Tennessee almost ruled the United States. The element of state pride is to be seen in this declaration, but it is certainly true that for the greater part of the period indicated there was no other State that displayed more activity in domestic politics, or exerted a larger influence upon Federal affairs. Tradition and precedent were far less potent in the west than in the older States, and there the people first realized and declared in their Constitutions and laws, their ability to stand alone and to manage their own affairs. Kentucky was the oldest of the western States, but in the first half of the 19th century, it was dominated by Mr. Clay, who was essentially

[19]Goodspeed's History of Tennessee, page 262.

conservative, and whose policy in almost every emergency was compromise. Jackson held in Tennessee almost the same position that Clay occupied in Kentucky, but was in all things aggressive and uncompromising, and was far more representative of the western spirit of the time than was his great rival. In the contest for the presidency he defeated Clay, served for eight years, named his successor, and, in effect, was the dictator of the more important policies of the administrations of Tyler and Polk. It is probably true also that the people of Tennessee were more advanced in their democracy than those of Kentucky. At least it is a fact that there was not in Tennessee, as there was in Kentucky, a powerful landed gentry, a class limited in numbers, but of controlling influence in affairs. But whether the cause was Jackson's personality, or the more pronounced democracy of the people, Tennessee probably impressed itself upon Federal affairs more than any other State during the period of transition from the old order to the new one, which was inaugurated by Jackson's first election. Her prominence began in the agitations that preceded the war of 1812. George W. Campbell, Senator from Tennessee, was probably the most effective advocate of the embargo in the debates of 1808, and his arguments became authority in favor of the power of Congress to suppress commerce for cause.

The actual declaration of war received no stronger support than from Felix Grundy, who was then in

the Senate, and who was effectively assisted by his colleague, Joseph Anderson.

The uprising of the Creek Indians was the bloodiest episode of the war, and was put down by the unaided efforts of Tennessee. Jackson led the fighting, while Governor Willie Blount deserved and received the thanks of the President, of the War Department, and the Legislature of Tennessee, for supporting him with a fund of nearly four hundred thousand dollars, raised upon his own responsibility. The one great triumph of our arms on land was the victory of Jackson at New Orleans, where the brunt of the battle was borne by Tennesseans.

From this time dates the prominence of Jackson.

Massachusetts and Virginia furnished the presidents until 1828, but of the succeeding twenty years, Tennessee held the office for twelve, and the great State of New York must thank Andrew Jackson for the first of the many Presidents it has given the Republic. The most effective support of the Mexican war, in council, and upon the field, came from Tennessee.

The history of the State's domestic politics during the time is full of interest and importance. In every presidential election from 1796 to 1832, the electoral vote of Tennessee was cast for the Democratic-Republican candidate. In 1824, John Quincy Adams received only two hundred and sixteen votes, and in 1828, only twenty-two hundred and forty. In 1832, Clay's vote was fourteen hundred and thirty-six, and

Jackson's twenty-eight thousand seven hundred and forty, but in 1836, while Van Buren received twenty-six thousand one hundred and twenty, the aggregate vote against him was nearly thirty-six thonsand, and in 1840, Harrison carried the State by twelve thousand. Until 1836 there was really only one party in the State; down to 1824, it was the Democratic-Republican party, and from that time until 1836, it is described most accurately as the Jackson party. There is justice in the assertion that this was not a healthy political condition, but it had a great deal to do with making Jackson president. From 1820 to 1828, the efforts of the political leaders of Tennessee were concentrated in the single effort to elect Jackson president, and William B. Lewis, John Catron, and John Overton, who were at the head of the movement, displayed a capacity for political management which has never been surpassed. When Jackson became President, there was only one important public man in Tennessee who was not his supporter, and that was John Williams of East Tennessee, who had been defeated by Jackson for the United States Senate after eight years of honorable service. Williams was a supporter of Crawford of Georgia for the presidency, and Jackson was the only man in the State who was strong enough to defeat him. In this struggle Colonel David Crockett supported Williams, was alienated from Jackson, and was afterwards the first politician of note in the State to declare himself a whig. The

Williams-Jackson episode was not of immediate importance, the steadily rising tide of Jacksonism speedily obliterating its effect.

The State was rich in strong men such as Overton, Catron, Grundy, Bell, Hugh L. White, Aaron V. Brown, James K. Polk, John H. Eaton, William Carroll and Sam Houston. Of these, two reached the presidency of the United States, two others were nominated for it, one became the president of the Republic of Texas, one was for twenty-five years a member of the Supreme Court of the United States, one was president *pro tempore* of the Senate, two were speakers of the House of Representatives, four held cabinet positions, five were senators, one was governor of the State for twelve years, and three were Judges of the Supreme Court of the State. There were many others hardly less distinguished than these, and all were at first, of the Jackson party. Jackson was in a class by himself, and the second man in influence and deserved popularity was Hugh L. White, Senator from 1825 to 1840, and one of the ablest and purest men that ever appeared in public life in this country. The people of Tennessee desired that he should succeed Jackson, but the President, almost at the beginning of his administration, had selected as his successor his suave and serviceable friend, Martin Van Buren, who soon became literally the heir apparent. Tennessee was not for Van Buren, and this was particularly true of Senator White. Jackson was

aware of White's great popularity, and of the importance of diverting his attention from the presidency if possible, and therefore offered him many high places, all of which were declined. This, coupled with certain unmistakable signs of insubordination on White's part, provoked the ready resentment of the President, which, in 1834, broke out in the extraordinary statement that if White became a candidate, he would be made odious to society. In December of the same year White did become a candidate, and the administration did its best to carry out the threat. Nearly all the Tennessee delegation in congress supported White, prominent among them being Bell and Crockett. This was the outbreak of a political revolution in Tennessee which had been preparing for years, and only awaited an auspicious time.

It was impossible that with so many able men, there should not be many unsatisfied ambitions, jealousies of Jackson's predominance in the State, and resentment of his methods. The establishment of a new party was the obvious way of gratifying all these feelings, and it did not require a profound intelligence to understand that the adherence of all the people to one party was an unnatural and, necessarily, a temporary condition.

Nevertheless, so powerful was the influence of Jackson, and so great the reluctance of men, then as now, to admit a change of political allegiance, that the

insurrectionists continued long to avow their loyalty, to Jackson, and to refuse to call themselves whigs.

The struggle within the State which followed White's announcement was one of thrilling interest, and of unparalleled bitterness. The relations of the President with John Bell, while apparently friendly, had not been cordial after 1827 when Jackson had supported Felix Grundy in his unsuccessful contest with Bell for a seat in congress. Therefore, the administration's organ at Washington, at once declared that Bell was using White to the injury of the President. It was decided that Bell must not be returned to congress in the election of 1835, but all the influence of the administration failed to induce any one to oppose him. In that year White was returned to the Senate, and the Jackson candidate for governor, the hitherto invincible Carroll was beaten by Newton Cannon, who had been defeated for that office by Sam Houston in 1827. But as Jackson had received practically the unanimous vote of the people of Tennessee in the last three presidential elections, he could not believe that his will would be disregarded in 1836. Nevertheless, he omitted nothing to insure success. The press of the State favored White, and therefore editors trained in vituperation and truculency were imported by the administration party to abuse and ridicule White and Bell. The whole year long there was a rain of epithets, of charges and countercharges. The language of denunciation was exhausted; the State was in tur-

moil; old allegiances were cast aside with contempt and new ones assumed with enthusiasm, every man became an orator, and not a few attempted poetry with the most inferior results. Jackson willingly endured the fatigues of the long overland journey from Washington, in order, as his enemies said, to thrust "the little huckster" Van Buren down the throats of the people of Tennessee. The followers of White were branded as whigs, and repelled the charge indignantly. The epithets most in favor with the Jackson party were, "ingrate," "apostate," and "traitor." Adjectives below the superlative degree were discarded, and the inadequacy of the superlative was demonstrated, so far as Tennessee politics is concerned.

But despite the epithets, despite Jackson's strenuous personal efforts, and the able support of his trained lieutenants, it became apparent before the election, that Tennessee would have none of Van Buren.

White carried the State, and worst of all, carried the Hermitage precinct, and thus, one year after the adoption of the new constitution, the Whig party arose in Tennessee, although it did not adopt the name until 1839.

White died in 1840, and Jackson in 1845, and thenceforward until the civil war, Bell was the foremost man in Tennessee, and the undisputed leader of the Whig party in the State.

In 1839, the democrats were once more victorious in the State election, James K. Polk having resigned

from Congress to become a candidate for Governor. But when he sought re-election in 1841, he was met and overthrown by the inimitable whig champion, James C. Jones, who had not a tithe of Polk's ability, but was the foremost jester of his time. In the presidential election of 1844, Mr. Polk was unable to carry Tennessee, and in 1848 and 1852, likewise, the electoral vote of the State went to the whig candidates, but in 1856, Buchanan received a majority of seven thousand, and democratic electors were chosen for the first time after 1832. The majorities however, had been small in all the elections, and in 1849, William Trousdale, democrat, was elected Governor by a majority of less than fifteen hundred. In 1860, Bell and Everett had a plurality of less than five thousand, and lacked nearly seven thousand of receiving a majority.

The last important whig demonstration was in 1856, culminating in the famous oration of William T. Haskell at Knoxville, the most noted political speech ever made in Tennessee.

From the organization of the Whig party, its most concentrated and least variable strength was in East Tennessee where it increased steadily until 1860, and was, after the war, transferred almost unimpaired, to the Republican party, to which that section furnishes now the bulk of its white vote in the State. During the war the mountain regions of Western Virginia, East-

ern Kentucky, Western North Carolina, and Eastern Tennessee, were strongly opposed to the remainder of the South, and geographically, formed a sort of wedge, penetrating to the very heart of the Confederacy. The persistency, in East Tennessee, of the tendencies thus manifest, will appear later.

The most striking thing exhibited in this review of political conditions, is the prominence of the State, from about 1830 to 1850, and in diminishing degree, to 1860, and this is to be accounted for by the fact that Tennessee was the best representative of the most important and effective political and social forces of the time. The people of the West had put aside the conservatism of the founders of the republic, and of the generation that succeeded them. The older States were, naturally, the strongholds of conservatism, of tradition, and of precedent, but every step westward left something of these behind, and brought increased self reliance and independence. There was not one of the strong democratic forces, which were at work in the second quarter of the 19th century, that did not find its best opportunity and outlet in Tennessee. Jackson was the incarnation of the new spirit of the time, and if he laid rough hands on the old institutions, and ignored cherished traditions that had outlived their usefulness, and even was guilty of excesses, when were results such as he accomplished, ever attained by gentler means? Jackson was the master workman in

establishing the power of the common people, and primarily, he represented the democracy of Tennessee. It was because Tennessee had the men best adapted to the work in which the people were then engaged, that she gave presidents to the republic, and for many years, directed its councils.

CHAPTER X.

INTERNAL IMPROVEMENTS AND THE STATE DEBT.

The history of internal improvements in Tennessee is important and unique, and, in the end, calamitous.

The first internal improvement Act was passed by the Territorial Legislature in 1794, authorizing a lottery to raise money to build a wagon road from Kingston to Nashville. The next session of the Territorial Legislature appropriated to the same purpose the proceeds of sales of certain salt licks and springs. The same spirit was manifest in a resolution of the Legislative Council in 1794, in which the House of Representatives did not concur, "that fourteen of the principal artists belonging to any furnace for the manufacture of iron in this Territory be exempt from military duty." When new counties were organized they needed jails, stocks and court-houses, and as the people could ill afford to pay the necessary taxes, the lottery became a frequent expedient for raising funds for public purposes, both ordinary and extraordinary. Not until about the time of the second Convention did the public conscience and judgment seem to become quickened on the subject of the lottery, and, as we

have seen, it remained long a favorite method of indirect taxation.

The Constitution of 1834 withdrew from the legislature the power to authorize lotteries, and required it to pass laws forbidding the sale of tickets in the State. Meanwhile, however, the State, using other instrumentalities, had entered upon an active and large policy of public improvements. The early Governors, from conviction, as well as from interest, were zealous advocates of the policy of increased facilities of travel and transportation. In 1811, Governor Willie Blount presented to the Legislature the application of the State of New York for instructions to our representatives in Congress to support the request of that State for Federal aid to its internal improvements, and no doubt he was inspired by the plans which were then submitted to him, to a more earnest advocacy of a similar policy in Tennessee. The journal of the Convention of 1834 attests the energy and the eloquence of his utterances in this behalf. McMinn, and the wise and practical Carroll, were no less favorable to internal improvements. The period was one of excessive expansion and in all the new States and in some of the old ones, there was a mania for internal improvements, and the democratic States were compelled by the party doctrine of strict construction of the Federal Constitution to refrain from asking aid from the general government. For some forty years after the organization of the Federal government, the

States, having been relieved, in 1790, by the general government, of their obligations, were free from debt, but the desire for development, first strikingly manifested about the end of the first quarter of the 19th century, produced a new and unfortunate condition. The improvement of waterways, the construction of canals and railroads, and the establishment of imperfect and unsuccessful State banking systems, resulted in the creation of enormous State debts. It is estimated that in 1840, bonds of the States to the amount of $230,000,000.00 had been issued, and about that time, Indiana, Illinois, Pennsylvania, Maryland, Mississippi, Michigan, and Louisiana, found it necessary to suspend payment of their debts, and three of them, two in the South and one in the North, were driven ultimately to downright repudiation. It will be seen later that in 1840 Tennessee became alarmed and repealed her internal aid statutes. This was the result chiefly of local causes, but no doubt the Legislature was impressed also by general conditions.

Before the era of railroads, Tennessee gave her attention to the improvement of her rivers, and to the construction of wagon roads that could be travelled in winter. There was talk also of building canals, and Governor McMinn would have united the river systems of Tennessee and Alabama in that way.

In 1823 the Legislature created a joint standing committee on internal improvements, which, in 1825, advised the construction of the "Great National

Road," traversing the entire length of the State, with its western terminus at Memphis. In 1829, railroad building had begun in the United States and canals, which are still of the greatest utility, had been built or were being constructed by certain States. No financial reverses had as yet befallen the States, and Governor Carroll, jealous of the prosperity of Tennessee, earnestly invoked the attention of the Legislature to the subject of internal improvements. That body was in thorough accord with him, and on January 2, 1830, took the first steps in a course which was to lead to important results, both good and bad.[1]

A Board of Internal Improvements was created, composed of six members, two from each grand division, elected by joint ballot of the two houses, and constituting a body corporate. To this corporation was appropriated the sum of $150,000.00, of which $30,000.00 was to be expended in West Tennessee, and $60,000.00 in each of the other grand divisions, as the Assembly might direct. The Governor was to be ex officio President of this Board.

In 1831, the number of Commissioners for East Tennessee was increased to three, and these were to receive the $60,000.00 already appropriated to that section, and were to use it in improving the Tennessee and the Holston and their affluents, and at the same time certain special Boards were created for subdivisions of Middle and West Tennessee.

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[1]Acts of Tennessee, 1829, chapter LXXV.

This plan of 1831 did not work satisfactorily. Its distinguishing feature was direct appropriation from the State Treasury, which, it was provided, might be aided by private subscriptions in the localities to be specially benefited.[2]

The Constitution of 1834 having declared for internal improvements, the State, in 1836, adopted a new plan.[3]

It was now to become a stockholder in railroad and turnpike corporations. As originally framed and passed, the Act provided that where any joint stock company had been, or might thereafter be incorporated by the State for constructing works of internal improvement by means of railroads, or macadamized turnpike roads within the State, and two-thirds of the capital stock subscribed, and in the opinion of the Governor, Comptroller, Treasurer and Secretary of State, well secured, the Governor should subscribe in the name of the State for the remaining third, paying therefor the twenty-five year bonds of the State bearing 5¼ per cent interest. The Company aided was to pay the interest on the bonds semi-annually, but the amount so paid, together with 5 per cent interest thereon, was to be deducted from the profits of the enterprise accruing to the State. The Governor was to appoint Directors in proportion to the State's stock. This partnership plan was borrowed from Pennsyl-

[2]Acts of Tennessee, 1829, chapter CV.
[3]Acts of Tennessee, 1836-7, chapter XXII.

vania. In 1838, the Bank of Tennessee was formed, and was designed in part, to aid the scheme of internal improvements, but it is not important to consider this feature. In 1839, it was provided that the State should subscribe for one-half, instead of one-third of the stock, but on the 26th of January, 1840, the Legislature repealed all laws authorizing the Governor to subscribe for stock in internal improvement companies.[4]

This Act provided a method of surrendering the charters of the assisted corporations, and of dissolution of the partnerships between them and the State. The immediate causes of the repeal were clearly indicated in the fourth section of the Act of 1840, which provided that where the State's subscription had been secured by fraud or mistake, or where fraudulent or improper use had been made of it, or of its proceeds, or where the State's subscription alone had been applied to the work, and private stockholders released, etc., etc., the Attorney General for the State should file a bill against the private stockholders, stating the facts.

This threat of investigation seems to have been effective. The State had already issued a large amount of bonds under the Act, and had incurred obligations to issue others which it could not honorably disregard, but otherwise, the Act of 1840, promptly destroyed the Act of 1836.

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[4]Acts of Tennessee, 1839-40, chapter I.

There was now an interval in which no systematic aid of internal improvements was attempted, or at least carried out, but in 1848, undeterred by unfortunate experiences, or forgetful of them, the State made a new venture by agreeing to become the guarantor or endorser of the bonds of certain railroad companies in specified amounts, and upon conditions stated in the Act.[5]

This Act was expected to attract capital to the State, but it did not, and it was fortunate that it failed, because there was no adequate provision in it for indemnifying the State, or for investigating the affairs of the corporations. The Board of Internal Improvements was directed to "take a lien" on the property of the company, whereas the lien should have been made a legal consequence of receiving the aid.

Finally, on the 11th of February, 1852, an Act was passed under which the wishes of the State to grant aid to internal improvements was amply gratified.[6]

This law provided for lending the credit of the State to railroads, upon the security of a statutory first lien properly declared in the Act. It was required that when a railroad should have secured bona fide subscriptions for stock, sufficient to prepare the whole of its line for the iron rails, and should have graded, bridged and made ready for the rails, thirty miles of its roadway at either terminus, the Governor should issue 6 per

[5]Acts of Tennessee, 1847-8, chapter CLXIX.
[6]Acts of Tennessee, 1851-2 chapter CLI.

cent bonds of the State at the rate of $8,000.00 per mile, the proceeds of which were to be applied exclusively to placing the rails and their necessary attachments on the road. The process was to be repeated as each additional twenty miles of roadway, connecting with the section first completed, was prepared for the rails. The bonds were to run not less than twenty nor more than forty years. The amount per mile was increased afterwards to $10,000.00, and an allowance was made for bridges, so that in the end the State paid about $11,000.00 a mile. Other immaterial changes in the plan were made from time to time, but there was no fundamental alteration. The roads were required to deposit semi-annually, in the Bank of Tennessee, the amount of the interest on the bonds, and at the end of five years to deposit there annually 1 per cent of the amount of the bonds to create a sinking fund. In 1856, the sinking fund was increased to 2 per cent, and in 1860, to 2½ per cent per annum. The Governor was authorized to appoint two State directors for each corporation receiving the aid provided by the Act. If any road should fail to pay interest as required, the Governor was to have it placed in the hands of a receiver until such time as all arrears should have been paid, and if at the maturity of the bonds a road should fail to pay them, the State was authorized to take possession of and sell it.

Of the provisions of this really well devised, and adequately guarded statute, the railroads naturally

availed themselves, promptly and largely, and before the Civil War there had been issued under it, the sum of $13,739,000.00 in bonds.[7]

If we add to this the State debt proper, so called, amounting to $3,768,806.00, and consisting of bonds issued for stock in certain railroads, for building the capitol, for buying the Hertimage, to the Union Bank, to the Bank of Tennessee, and in aid of turnpikes and $87,000.00 of small secondary liabilities we shall have as the amount of the State debt, primary and secondary, at the beginning of the civil war, $17,594,806.00. After May 6, 1861, the State issued in aid of a railroad and turnpikes $180,000.00. It was also under a contingent liability, as endorser of railroad bonds, in the amount of $2,207,000.00, so that the total of its actual and contingent liabilities down to 1862 was $19,981,806.00. The $180,000.00 of bonds issued after May 6, 1861, were repudiated by the schedule to the amendments of 1865, but nevertheless were funded in 1866. After the civil war, the Legislature was, for a number of years, frequently engaged with the State debt, which increased steadily in amount. Not only were new bonds issued under the Act of 1852, but old bonds as they matured, and installments of interest as they accrued, were funded, and the debt assumed enormous proportions.

In 1866, bonds to the amount of $4,941,000.00 were

[7]Senate Appendix, 1879, Message of Governor Marks, page 5.

issued to pay matured bonds, and to fund war interest,[8] and in 1868 $2,200,000.00 more of funding bonds.[9]

It is not necessary, and would be confusing, to go further into details. It is sufficient to say that the report of the Comptroller for 1868 shows that the amount of the debt estimated as of January 1st, 1869, was $34,441,873.00.[10]

On the 25th of February, 1869,[11] was passed an Act to liquidate the State debt contracted in aid of railroads. This Act allowed the companies to pay the State in bonds of the series, issued to them respectively, which was the least objectionable form that such an enactment could have taken. But on January 2, 1870,[12] an Act was passed which allowed them to pay in any legally issued 6 per cent bonds of the State. Both the original and the amendatory Acts were distinctively railroad measures. The last was a grave mistake on the part of the Legislature, and produced a bountiful crop of bitter fruit. In 1869, sentiment in Tennessee was settled in the conclusion that the bonds issued after the War, or most of them, did not in law or in equity, constitute a valid claim upon the State, and the Legislature took steps toward investigating them. Thereupon a plan was formed, or at

[8]Acts of Tennessee, 1865-6, chapter IX.
[9]Acts of Tennessee, 1867-8, chapter LXIX.
[10]House Appendix, 1868-9, page 53.
[11]Acts of Tennessee, 1868-9, chapter XXXVIII.
[12]Acts of Tennessee, 1869-70, chapter XLVII.

least was threatened, to reconstruct Tennessee after the manner adopted in other Southern States. Probably there was no real danger that this would be done, but the people were genuinely in fear of it for a time.

The railroads lost no time in taking advantage of the amended liquidating Act. The suspected bonds were to be had on the market at prices ranging from seventy-five cents, downward indefinitely, and the report of an investigating committee of the Legislature made in 1879, states that at least one newspaper was paid to cast suspicion on, and depreciate the post bellum bonds.[13]

The result was that the railroads paid to the State over $14,000,000.00 in bonds, about $10,000,000.00 of the amount being in post bellum issues.

In 1872, an Act was passed for the sale of delinquent railroads under which eleven roads were sold for the aggregate sum of $6,698,000.00. To these eleven roads had been delivered bonds to the amount of $14,648,000.00 so that there was a loss to the State of $7,950,000.00.

During the administration of Governor Porter in 1877, certain of the creditors proposed to adjust their particular claims against the State at fifty cents on the dollar for principal, and past due interest, giving assurance that the great body of creditors would accept the same terms.[14]

[13]Report, Senate Appendix, 1879, page 19.
[14]Senate Appendix, 1879, Governor Porter's Message, page 7.

The Governor urged the acceptance of the proposition but no action was taken by the Legislature. The fact that such an offer was made by the creditors, must have its effect in justifying, in no small measure, the final action of the State on this question, but in view of the facts now to be stated, it would hardly be fair to say that the proposition was altogether voluntary.

In his message of 1879 Governor Porter said: "The State has issued 49,393 bonds amounting to $49,173,-316.66; the number cancelled is 28,385, amounting to $28,163,016.66; the number now outstanding as a liability against the State is 20,219, amounting to $20,221,300.00. In ten years the State has paid three installments of interest, seven are past due amounting * * * to $4,052,717.00, making a debt, principal and interest, of $24,274,000.17." [15]

The crisis was now approaching. Before 1861 the State had begun to feel the burden of the debt, and the Bank of Tennessee had staggered under the load imposed upon it, and had called for help. In 1857 it suspended specie payment. It may be said in reply that at the time indicated, conditions were exceptional, but at all events it had been demonstrated before the war that the State's fiscal equipment could not be relied upon absolutely under all circumstances. If it had been otherwise, Johnson, and other governors

[15] Senate Appendix, 1879, Governor Porter's Message, page 6.

would not have advised the discontinuance of the Bank, which, it must be remembered, was in a sense, a part of the scheme of internal improvements. On the other hand the railroads had not defaulted before the war, and it is difficult to see how any harm could have come to the State if they had remained solvent and had continued to meet their obligations. It is reasonably certain that Tennessee, but for the war and its consequences, would have realized the hopes with which she entered upon her schemes of internal improvement. The emancipation of the negroes, and the other immeasurable industrial and financial misfortunes of the war would have crippled the State greatly, but when to these was added liability on so large a part of its bond endorsements, so imprudently increased after the war, the condition became exceedingly grave.

If left alone the State would, unquestionably, have refused promptly to pay a large part of the railroad bond debt made after the war, but the retirement of the objectionable bonds, as a result of the unfortunate railroad acts of 1869 and 1870, made the people exceedingly reluctant to deal summarily with the remainder of the debt, and held them for a long time between two opinions, so that the settlement was postponed for twelve years after the restoration of political affairs to a normal condition, and this interval was full of dissatisfactions and troubles to the State and to its creditors.

The Democratic Legislature of 1879, a body of strong men, took hold of the question vigorously.

The Democratic party has been dominant in Tennessee from 1870 until the present time, except in 1881 and 1882, when it suffered a temporary loss of power on account of division on the debt question.

One of the first legislative utterances after its return to power in 1870 was a declaration of its purpose to maintain the credit of the State.[16]

The platforms of 1876 and 1878 declared for the maintenance of the State's credit and avowed opposition to repudiation, and these utterances were made in good faith. The platform of 1878 was mainly the work of Judge Marks, who in that year was elected Governor. In his first message Governor Marks took strong ground in favor of a careful investigation of the State debt, and of an adjustment upon a basis of equity to the State as well as to the bond holders. Among other things he said: "As to that part of the debt embracing the post war bonds, no part of it should be settled now, or hereafter, only in so far as the bonds were issued, sold and used, in conformity to law."[17]

It was at the session of the Legislature to which this message was delivered, that the committee of investigation was appointed, and made the report which has been referred to. The leading men of the committee were Judge S. F. Wilson, and

[16]Acts of Tennessee, 1869-70, Resolution XI.

[17]Senate Appendix, 1879, Governor Marks' Message, page 15.

Judge David L. Snodgrass, both of whom afterward rose to high places in the State. A majority and a minority report were submitted. Messrs. Wilson and Snodgrass were with the majority, whose report was strongly adverse to the validity of the railroad and war interest debt, and was a forceful presentation of the view of the question which finally was accepted by the party. But as yet the dominant sentiment among the Democrats favored a settlement by agreement with the bondholders. There were many in the party who would have advocated the payment of the debt in full, in preference to a forced settlement, but no one, probably, denied the existence of strong equities against a great part of it. Gradually, however, there had grown up a party within the party which held that the State was the best judge of its own rights and should pay so much of the debt as had been created in compliance with the law, and no more, and that the railroad bonds, especially the later ones, and the war interest bonds had not been so issued as to be binding on the State. The platform of 1878 had declared against repudiation and in favor of equitable adjustment, subject to the ratification of the people at an election. In pursuance of this declaration, the Legislature of 1879 passed an Act for the settlement of the debt, principal and accrued interest, at fifty cents on the dollar, and four per cent interest, and directed that an election be held for the ratification or rejection of the plan. The elec-

tion was held August 7, 1879, and the vote was against the settlement. The fight against the bonds was resumed with increased vigor. It was urged that the railroad bonds were against the letter and the spirit of the constitution of the United States: that they were unauthorized by the State Constitution: that the Legislature having no power to issue bonds could not ratify their issuance, or do any act to estop the State; that many of the bonds had been issued in violation of the statutes authorizing them; that the passage of certain statutes authorizing bonds had been secured by fraudulent means; that the State had been under duress, in 1869, to forego the investigation and rejection of the post bellum bonds, and that the demand for war interest was both unprecedented and unconscionable. These and many other arguments were urged with force and effect.

The situation within the Democratic party was unique and interesting. When the debt question was first agitated, and indeed until 1882, the more prominent leaders, as a rule, belonged to the high tax or State credit wing, and not a few of them remained firm to the end.

Andrew Johnson, as a member of the Legislature, had opposed the public improvement acts, and in speeches made in 1874 he declared that the issuance of the bonds had been unconstitutional, that frauds had been practiced in selling them, that many of them were held by persons who had paid from thirty to

fifty cents on the dollar for them, and were entitled to interest only in proportion to their investment.[18]

He is reported to have said that no generation has the right to incur debts extending to another generation,[19] but nothing has been found to show that he advocated the repudiation of any part of the debt.

Many of the leaders were in Congress and necessarily absent much of the time from the State, and many of those who were at home failed to apprehend the trend of affairs or to exert themselves in behalf of their opinions. There was in Tennessee at this time a singular man of remarkable abilities and of invincible tenacity, who for years had been the incessant and bitter antagonist of the bonds, missing no opportunity to declare them iniquitous. The State credit men, unfortunately for themselves, underestimated both his ability and his influence, and allowed him to have the field practically to himself. This was John H. Savage, to whom more than to any other man, perhaps more than to all other political leaders combined, the result of the debt question in Tennessee is to be attributed. He began the fight almost alone, when the word "repudiation" was shocking to the people, and abhorrent to the politicians, and was freely applied to every suggestion of curtailing the debt. He was sneered at and abused, but with unsurpassed persistency and courage, he

[18]Memphis *Avalanche*, October 11, 1874.
[19]Memphis *Avalanche*, September 22, 1874.

maintained his position and gradually his arguments found lodgment in the public mind. In the beginning he stood almost alone, in the end he triumphed, but received no personal benefits.

James D. Porter, Governor from 1875 to 1879 was the consistent, firm, and able champion of the opposing policy.

In the final struggle, the leaders of the low tax party were, Wm. B. Bate, D. L. Snodgrass, S. F. Wilson, and John H. Savage, who at the last received valuable support from Senator Isham G. Harris. Opposed to these were James D. Porter, Howell E. Jackson, James E. Bailey, Horace H. Lurton, J. M. Dickinson, Luke E. Wright, and others.

The Democratic convention of 1880 met under circumstances that promised and produced the disruption of the party. The platform adopted favored a prompt settlement of the debt upon the best terms that could be secured by negotiation with the creditors. This was unsatisfactory to the low tax men, who left the convention and adopted a platform of their own, favoring the adjustment and speedy payment of the State debt proper, denying the validity of all railroad bonds, and demanding that the payment of them be left for settlement by the courts in controversy between the railroads and the bondholders; and denying also the validity of the war interest bonds. It declared that no settlement should be made which had not first been submitted to the people.

The regular Democratic convention nominated John V. Wright for governor, and the low tax convention nominated S. F. Wilson. These two divided the Democratic votes, Wright securing about 20,000 more than Wilson, and the Republican candidate, Alvin Hawkins, was elected upon a platform opposing repudiation.

On the 6th of April, 1881, the Legislature, a majority of its members being Democrats, passed an Act for the settlement of the State debt, except the bonds held by educational and charitable institutions, and those issued for the permanent school fund, dollar for dollar, with three per cent interest, the coupons to be receivable for taxes.[20]

Within two weeks after the approval of the Act by Governor Hawkins, it was attacked in the courts, and was held by a divided Supreme Court to be unconstitutional, in that it attempted to devote, irrevocably, a part of the State's future revenues to a specified purpose for many years, precluding any change in this respect by subsequent Legislatures.[21]

At the third extra session of the same Legislature was passed another Act settling the debt at sixty cents on the dollar, with a graded rate of interest, three per cent for two years, four per cent for two

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[20]Acts of Tennessee, 1881, First Session, chapter CLXXIII.

[21]*Lynn* v. *Polk*, 8 Lea's Tennessee Reports, pages 121 and 328.

years, five per cent for two years, and six per cent after that, but this settlement was not accepted by the bondholders, and, as we shall see, did not end the matter.

As the time for the Democratic convention of 1882 drew near it became apparent that leaders of both factions were making strenuous efforts to restore harmony in that party. Harmony was attained, but the low tax men dictated the terms. They were thoroughly organized and splendidly led. A platform was adopted declaring for the funding of the railroad debt at fifty cents on the dollar, and three per cent interest; for funding dollar for dollar at six per cent interest, all bonds held by literary, charitable, and educational institutions, and for funding the State debt proper on the same basis, at the usual rates of interest, after eliminating the war interest. W. B. Bate was nominated for Governor and was elected. The more persistent State credit men, who came to be known as the "sky blues," left the convention, and adopted a platform reaffirming the State credit platform of 1880, and approving the settlement proposed by the extra session of the last Legislature. Joseph H. Fussell was nominated for Governor, but received only 4,814 votes.

The Legislature of 1883 finally settled the debt systematically upon the plan set out in the Democratic platform of the preceding year, and thus a most vex-

ing and dangerous question passed out of the politics of the State.[22]

At that time the debt, principal and interest, was estimated to be $28,786,066.19; the amount to be funded at fifty cents on the dollar was $26,783,150.00, so that the total debt as established by the Act of 1883, was $15,784,608.19.[23]

Soon afterward this amount was increased nearly $1,000,000.00 when it was decided that the new issue notes of the bank of Tennessee must be paid by the State.

The bonds issued in 1883 run for thirty years, but have been redeemable at the option of the state since July 1, 1888.

In 1859, the bonded indebtedness of the State was over sixteen and a half millions; in December, 1902, it was a little over sixteen millions. In 1869, it reached thirty-seven millions. In 1859 and in 1869 the State was only secondarily liable for the greater part of the bonds, and at the first of these dates the principal debtors were solvent, and as a rule prosperous, but the course of events, as we have seen, has been such that the property of many of the principals was exhausted, and the debt for which the State is now absolutely and solely liable, is almost as large as its secondary liability of 1859.[24]

The Comptroller's reports show that in December,

[22]Acts of Tennessee, 1883, chapter LXXXIV.
[23]Message of Governor Bate, January 12, 1885.
[24]Comptroller's Report, 1904, page 18.

1898, the bonded debt was $17,351,866.66, and in December, 1902, $16,021,466.66, a reduction in four years of $1,330,400.00, under the administration of Benton McMillin as Governor, Theo. F. King, as Comptroller, and Edward B. Craig as Treasurer. Under succeeding administrations additional reductions have been made, and there is good reason to hope that Tennessee will enter the second quarter of the twentieth century free from the burden of debt, under which she will then have labored for sixty years.

It becomes the writer, a State credit Democrat, whose opinions have undergone no change, to ascribe to those to whom he was opposed the same sincerity and patriotism which he believes to have animated those with whom he agreed. No one will deny that the equities and the legal defenses of the State against the bondholders were many and strong, and that it was only just that the debt should be reduced materially. The proposition made to Governor Porter to accept fifty cents on the dollar, was made by the bondholders in view of the evident financial distress and inability of the State, and also of the legal and moral infirmities of the bonds, and may be held to show that the final settlement was not very far from their own conception of what was just in the premises. The 50-4 proposition of 1879 was generally acceptable to the State credit men, as was also the Act for settling at sixty cents of the dollar. Thus, while it is

true that the bondholders were not consulted, nevertheless, the adjustment was made upon a basis which did not vary greatly from what they may fairly be said to have approved, and in any event, the motives of the people of Tennessee cannot be justly impeached. That they were honest in purpose, and sincere in their belief, may be asserted most positively.

The argument against the bonds has not been set out in full, but enough has been said to show that the basis of settlement was in substantial accord with the opinions of the bondholders as indicated by them more than once, and that criticism of the State is directed to the method pursued rather than to the result reached. If the transaction had been between individuals, a court of equity, with the facts before it, and unaffected by technical estoppels, certainly would have relieved the State of a very large part of the debt, not less probably than the amount eliminated by the Legislature.

The Constitution of 1870 retains that clause of the Constitution of 1834, which declared that the Legislature should encourage internal improvements,[25] but elsewhere it provides that the credit of the State shall not be loaned or given hereafter to any "person, association, company, corporation, or municipality," and that the State shall not become the owner in whole or in part of any bank, or a stockholder with others in any association, company, corporation, or municipality.[26]

[25]Constitution of 1870, Article X, section 11.
[26]Constitution of 1870, Article II, section 31.

CHAPTER XI.

SECESSION AND RECONSTRUCTION.

The conduct of Tennessee upon the question of secession is full of interest, and in certain respects, is almost pathetic. It has been shown that from the time when Andrew Jackson became one of the great figures in national affairs, down almost to 1860, Tennessee had a part in making the history of the country not inferior to that of any other State in the Union. She had been the leader of the new States, and in the policies which they represented, and probably her public men had done more than those of any other State to produce the new order which arose about the end of the first quarter of the 19th century. Having done so much for the Republic, loving it sincerely, having pride in its achievements and in her own honorable part in its history, Tennessee was compelled in 1861 to take sides on a question, the determination of which could be reached only by an appeal to arms, and which involved the existence of the Union. It is very certain that no State gave up more than Tennessee in leaving the Union, and that none is more thoroughly entitled to have it believed that it acted upon conviction.

Four distinct influences operated powerfully upon her people at this time. The first was a sincere and intense love of the Union, coupled with pride in its greatness. The second, was a belief, not in secession as a constitutional right, but in the doctrine of strict construction of the Federal Constitution as taught by the men who had led the Democratic party in the South from the time of James Madison, and the accompanying fear of undue assumptions of power by the Federal Government. The third was the pro-slavery sentiment of a majority of the people who were convinced that the institution of slavery, so clearly approved by the Constitution, and supported by the Federal Courts, was being unconstitutionally attacked and limited. The fourth was a sectional feeling from which no State in the Union was exempt at that time, if any be exempt now.

The first of these four held Tennessee in the Union long after the actual secession of the Southern States had begun. The others grew in strength and intensity as the sectional controversy progressed, and finally became ascendant by reason of the policy of the Federal Government immediately after the attack upon Fort Sumter, in April, 1861.

Mr. Lincoln's first call for volunteers to suppress insurrection was the immediate cause of the secession of Tennessee. A brief recital of events is necessary at this point.

The State was strongly represented in the Democratic national Convention at Charleston, South Carolina, in 1860, and her delegates assumed a position so conservative and so unsatisfactory to the extreme southern element, that they were regarded throughout the South with disapproval and distrust. When the Convention, having adjourned without reaching a conclusion, re-assembled at Baltimore, the Tennessee delegates still hoped by maintaining a conservative position to bring about a compromise between the extreme factions of the party. Almost immediately it became apparent that this hope was without foundation, and when the disruption of the Convention occurred, Tennessee was one of the States that withdrew, and nominated John C. Breckenridge for the presidency. On May 9th, 1860, a Convention composed of delegates from twenty-two States met at Baltimore, and nominated John Bell of Tennessee for president. To the party thus organized, its adherents gave the name of "Constitutional Union Party." Its Convention declined to adopt a platform, but contented itself with a simple resolution declaring for the Union, the Constitution, and the enforcement of the laws. There was no Republican electoral ticket in Tennessee in 1860, and Bell and Everett carried the State by a plurality substantially commensurate with the Douglas vote and with the ordinary democratic majority. That is to say the full whig strength went to Bell and Everett, and the majority of the demo-

cratic votes to Breckenridge, while Douglas was supported by about 10,000 conservative Democrats. The result indicated a small preponderance of Union sentiment in the State, but really that strength was much greater than appeared from this vote. South Carolina went out of the Union in December, 1860, and one after another the larger slaveholding Southern States followed her. The border States, notably Tennessee and Kentucky, still hoped to be the means of accommodating affairs and of preventing actual disruption. It is a striking fact that the Whig leaders of Tennessee continued to hope to save the Union by a compromise, even after hostilities had begun. A majority of the prominent men of the State were Whigs. Among these were John Bell, Neill S. Brown, Balie Peyton, Return J. Meigs, Robert Hatton, John C. Brown, Thomas A. R. Nelson, Horace Maynard, William G. Brownlow, John Netherland, William B. Campbell, John Marshall, Robert L. Caruthers, and Gustavus A. Henry.

Among the more conspicuous Democrats were Andrew Johnson, A. O. P. Nicholson, Isham G. Harris, Cave Johnson, and Landon C. Haynes. Andrew Johnson, however, remained always, a Union man, and Cave Johnson went with the State reluctantly when she seceded. Chief among the Unionists was John Bell, who had been the leader of the Whig party in Tennessee from its first appearance in the State. The secession leader was Isham G. Harris, the Gov-

ernor of the State. He was not a disunionist for the sake of disunion, but believed that the constitutional rights of the Southern States were being infringed so far as to justify, indeed to require, secession.

On the 8th of December, 1860, the Governor issued a call for a special session of the Legislature to begin January 7th, 1861, the object being as declared in the call, to "consider the present condition of the country."

The General Assembly met at the time named, and the Governor sent in a message which clearly indicated his own position, but did not suggest radical measures. He declared that he had no doubt of the necessity, and the propriety of calling a Convention to consider the subject of the Federal relations of the State, and advised the Assembly to provide by law for submitting to the people the question of "convention or no convention." He said further, "If there be a remedy for the evils which afflict the country, consistent with the perpetuity of the Union, it will, in my opinion be found in such constitutional amendments as will deprive the fanatical majorities of the North of the power to invade our rights, or impair the security or value of our property." He suggested five amendments of the Federal Constitution: First, the establishment of a line on the northern boundaries of the slave States and extending to the Pacific, north of which, all territory should be forever free, and south of it forever slave; Second, a strengthening of

the fugitive slave law: Third, a provision for the protection of slave owners, having slaves temporarily in any other than a slave State; Fourth, an express prohibition of laws abolishing slavery in the District of Columbia, or in any federal district or reservation within a slave State; and, Fifth, that these provisions should never be changed without the consent of all the slave States.[1]

These suggestions seem to indicate that Governor Harris still believed it to be possible to avert war, but farther on in the message he said, "Before your adjournment, in all human probability, the only practical question for the State to determine will be whether or not she will unite her fortunes with a Northern or Southern Confederacy; upon which question, when presented, I am certain there can be little or no division in sentiment, identified as we are in every respect with the South."[2]

On the 19th of January, 1861, an Act was passed ordering an election to be held on the 9th day of February ensuing, to determine whether or not there should be a Convention as recommended by Governor Harris, and also for the choice of delegates to the Convention which was to have 100 members.[3]

The last section of the Act provided that the Con-

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[1]Governor's Message, Acts First Extra Session, 1861, page 8.

[2]Acts of Tennessee, First Extra Session, 1861, page 10.

[3]Acts of Tennessee, First Extra Session, 1861, chapter I, page 15.

vention if called, should have no power to take any action changing "the position or relation of this State to the National Union or to her sister Southern States," until the same should have been submitted to and ratified by a majority of the qualified voters of the State, taking as a basis the vote cast at the last preceeding State election. The election was held and a full vote was cast. For the Convention the vote was 57,798, against it, 69,675. In East Tennessee, the majority against the Convention was five to one. Middle Tennessee gave a majority of 1,382 against it, while West Tennessee was for it by a majority of over 15,000. The real test of public opinion, however, was in the vote for delegates. The aggregate vote for Union delegates was 88,803, and for disunion delegates 24,749.

It must be remembered that when this election was held, seven Southern States had seceded, and the provisional government of the Southern Confederacy had been organized. No wonder then that the Union people were jubilant, and believed that secession had received its death blow in Tennessee. The situation remained practically unchanged for two months. The secessionists continued to avow their devotion to the Constitution, and the conviction that that sacred instrument had been trampled on by the North. Some of the Union leaders, recognizing the strength of the opposing faction, willing to placate it, and confident that Tennessee would not secede, imprudently de-

clared what they would do in certain contingencies which they did not expect to arise, and were consequently not a little embarrassed when unexpectedly confronted by the very conditions as to which they had so imprudently committed themselves. Fort Sumter was attacked, and on April 15, Mr. Lincoln issued a call to the Governors of the States remaining in the Union, for volunteers to suppress the insurrection. Governor Harris telegraphed an indignant refusal. Instantly the situation in Tennessee was radically changed. East Tennessee stood firm, but in the other divisions of the State there was a sweeping and irresistible change to the side of secession. The newspapers, outside East Tennessee, almost unanimously sided with the South, and many public meetings in Middle, and West Tennessee declared for secession. From the moment when the call for volunteers was received it was certain that Tennessee would secede, and it was at this crisis that the Whig leaders were called upon to make good the promises which had been imprudently made, so far, as some of them were concerned, and certain of those who had not already declared themselves felt constrained now to do so. As late as April 18, 1861, a number of Union leaders, issued an address to the people of the State in which they said, "Tennessee is called upon by the President to furnish two regiments and the State has, through her executive, refused to comply with the call. This refusal of our State we fully approve. Should a pur-

pose be developed by the government of overrunning and subjugating our brethren of the seceded States, we say unequivocally, that it will be the duty of the State to resist, at all hazards, and at any cost, and by arms, any such purpose or attempt." The address further called upon the State to arm, and to maintain a position of armed neutrality.[4]

On the 15th of April, Governor Harris issued a call for a second extra session of the Legislature to meet on the 25th of April. In his message he explicitly advocated an ordinance by the General Assembly, "formally declaring the independence of the State of Tennessee of the Federal Union, renouncing its authority and re-assuming each and every function belonging to a separate sovereignty."[5]

On the sixth of May the Legislature passed an Act "to submit to a vote of the people a declaration of independence, and for other purposes."[6]

This Act directed the Governor forthwith to order an election to be held on the 8th of June, at which should be submitted to the people a declaration embodied in the Act entitled "declaration of independence and ordinance dissolving the federal relations between the State of Tennessee and the United

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[4]Greeley's American Conflict, volume I, page 481.

[5]Governor's Message, Acts, Second Extra Session, 1861, page 7.

[6]Acts of Tennessee, Second Extra Session, 1861, chapter I, page 13.

States of America." The purport of this declaration is sufficiently indicated by the following extract: "We, the people of the State of Tennessee, waiving any expression of opinion as to the abstract doctrine of secession, but asserting the right as a free and independent people, to alter, reform, or abolish, our form of government in such manner as we think proper, do ordain," etc.[7]

The Act provided that all volunteers in the service of the State should be entitled to vote in the county in which they might be stationed at the time of the election. It also embodied an ordinance for the adoption of the Constitution of the provisional government of the Confederate States of America.[8]

On the first day of May a joint resolution had been passed authorizing and requesting the Governor to appoint three commissioners to enter into a military league with the Confederate States.[9]

The Governor appointed Gustavus A. Henry, A. W. O. Totten, and Washington Barrow as such commissioners, and on the 7th day of May, the agreement entered into between them and Henry W. Hilliard, the commissioner of the Confederate States, was submitted to the Legislature by the Governor,

[7]Acts of Tennessee, Second Extra Session, 1861, page 16.
[8]Acts of Tennessee, Second Extra Session, 1861, chapter I, page 17.
[9]Acts of Tennessee, Second Extra Session, 1861, Resolution 10.

and on the same day was ratified by that body. By the terms of this convention the military forces of the State, and all military operations were to be under the control of the President of the Confederate States until Tennessee should become a member of the Confederacy. When the State should enter the Confederacy, she was to turn over to it all the public property acquired from the United States, upon terms previously agreed upon between the Confederacy and other States under like circumstances. All war expenses of the State after secession and before entering the Confederacy were to be repaid it by the Confederate States.[10]

On May 6th had been passed "An Act to organize and equip a provisional force and for other purposes." Under the provisions of this Act, the Governor was to raise 55,000 volunteers, 25,000 for active service, and 30,000 as a reserve, and was to organize the army thus created, for twelve months. There were to be two Major Generals, and such subordinate officers as might be necessary. To meet the expenses of this proceeding the Governor was authorized to issue $5,000,000.00 of State bonds, to run for not exceeding ten years and to bear ten per cent interest. The County Courts were authorized to raise home guards for three months service, to be equipped and paid by the counties. Incorporated towns were authorized

[10]Acts of Tennessee, Second Extra Session, 1861, chapter II.

to levy special taxes and to issue bonds to defray the expenses of military defense.[11]

On May 8th an Act was passed prohibiting suits in courts of the State by nonresidents of the slaveholding States, and making it lawful for debtors of such persons to pay the amounts due from them into the State Treasury, which would refund them with interest at the end of hostilities.[12]

At the election of June 8th the vote was nearly 20,000 larger than in February, to-wit: for separation, 108,399; against separation, 47,233. Of the negative votes, 32,923 were cast in East Tennessee, 7,956 in Middle Tennessee, and 6,117 in West Tennessee. The aggregate for representation in the Confederate Congress was 107,712, against it, 47,359. The votes cast in the various military camps seem to have aggregated less than 13,000.[13]

An examination of the vote in detail will show that throughout the State the influence of recent events had been very great. On the question of separation the vote in East Tennessee was a little more than two to one against separation, but whereas Middle Tennessee had given a majority against the Convention at the February election, it now gave a majority of more than 50,000 for separation. On the 24th of June

[11]Acts of Tennessee, Second Extra Session, 1861, chapter III.

[12]Acts of Tennessee, Second Extra Session, 1861, chapter VI.

[13]Goodspeed's History of Tennessee, page 776; Rebellion Records, Series IV, volume I, page 901.

the Governor issued a proclamation formally dissolving the connection of Tennessee with the United States, and on July 22d, President Davis proclaimed Tennessee a member of the Confederacy. On the first of August, 1861, Tennessee voted to adopt the permanent Constitution of the Confederate States, and on the 24th of October elected G. A. Henry and Landon C. Haynes, Senators in the Confederate Congress. Thus the State became a fully equipped and active member of the new Republic. Meanwhile, military preparations had progressed rapidly. On June 18th the Governor reported to the Legislature that he had already organized, armed, and equipped, twenty-one regiments of infantry and had put them in the field, and that ten artillery companies, a cavalry regiment, and an engineer corps were being organized. In addition there were already three independent Tennessee regiments in the Confederate service.

It will be seen that Middle and West Tennessee carried Tennessee out of the Union. They were large slaveholding sections, and East Tennessee was not.

On May 30th, 1861, after the passage of the ordinance of secession by the Legislature, but before the election, a Convention composed mainly of East Tennessee Loyalists together with a few from Middle Tennessee, held in Knoxville, promulgated a vigorous protest against secession. Ten days after the June election, this Convention held a second session at Greeneville, where it reaffirmed the position taken at Knox-

ville, and appointed a committee to prepare a memorial to the Legislature, asking that East Tennessee be allowed to become a separate State.[14]

The Legislature declined to grant the petition, or rather, did not act upon it further than to refer it to a committee. The attitude of East Tennessee at this time caused the Confederate Government, upon the solicitation of State authorities, to send troops into that section, with the result of causing the exodus of a large part of the male population, and a corresponding increase in the Federal army, into which a great majority of the refugees volunteered. The Tennessee Legislature which was elected in 1861, met at Nashville, in December of that year, and adjourned to January 20th, 1862. It sat in Nashville from January 20th, to February 15th, 1862, the day before the fall of Fort Donelson, when it adjourned to Memphis. On March 20th, 1862, it adjourned without a day.

In the declaration of independence submitted to the people at the election of June the 8th, 1861, it was ordained that all laws and ordinances by which Tennessee became a member of the "Federal Union of the United States of America" be abrogated and that Tennessee be henceforth, "a free, sovereign, and independent State." The clauses of the State Constitution, requiring State officers to take an oath to support the Constitution of the United States, and all clauses

[14]Printed Journal of Convention in Lawson McGhee Library at Knoxville, Tennessee.

recognizing the Federal Constitution as the supreme law of the land were "abrogated and annulled."[15]

On the 3rd of March, 1862, Andrew Johnson was commissioned by President Lincoln as Military Governor of Tennessee, and entered on his duties on the twelfth of that month, the City of Nashville having been occupied by the Federal armies. Mr. Lincoln thought that Governor Johnson should conduct the affairs of the State, so far as possible under its own laws, and without unnecessary use of his military powers.

Conditions in the State, and, to some extent, the temperament of the Governor, were unfavorable to this policy. The people were not ready to accept the situation, and Governor Johnson was a man of great will power, and combativeness. It is only just to him to say that no one could have filled his place without incurring much ill will and censure from political opponents, and twelve years later he was elected Senator by the Democrats of Tennessee, who now opposed him so bitterly. Pursuing his usual bold and open policy, he made a number of speeches, in the course of which he said many things which must be attributed to, and excused by, the excitement of the time.

In the exercise of his powers he established a provisional government, with Edward H. East as Secretary of State, Joseph S. Fowler as Comptroller, Horace Maynard as Attorney General, and Edmund Cooper

[15]Acts of Tennessee, Second Extra Session, 1861, page 16.

as private secretary. He required the city council at Nashville to take the oath of allegiance, dismissing such members as refused to do so, and prosecuting some for treason. Ministers were subjected to a like ordeal, and certain citizens in private life did not escape. These strong measures, coupled with the retreat of the Confederate armies from the State brought to the side of the Governor most of the weak and wavering, of whom there were many.

Unduly encouraged by these manifestations, Governor Johnson, in April, 1862, ordered an election to be held in Davidson County, for local officers, in the ensuing month of May. One episode sufficiently illustrates the spirit in which this proceeding was conducted. The Unionist's candidate for criminal Judge at Nashville was defeated, and Johnson gave the successful competitor his commission, and at the same time sent him to jail.

The month of August, 1863, was the time for the election of congressmen and State officers. On the 17th of June of that year a Convention of Confederates met at Winchester, in Franklin County, nominated Robert L. Caruthers for Governor, and put in the field a full congressional ticket. Caruthers and all the nominees for Congress were elected. The Governor was not inaugurated but the congressmen were admitted to the Confederate Congress at Richmond.

On the first of July, 1863, the Unionists held a Convention at Nashville. There was much diversity of

opinion among the members as to the policy to be approved by this Convention, but finally, and mainly through the influence of the East Tennesseans, and in the face of substantial opposition from Middle Tennessee, it declared in favor of continuing the military government.

On the 19th of September, 1863, President Lincoln, moved by the urgency of the advocates of re-organization of the State government, and encouraged by the repeated and severe reverses of the Confederate arms, consented to measures enabling the loyalists of Tennessee and nine other Southern States to establish civil government, and on the 8th of December, 1863, issued a proclamation outlining a provisional plan, and embodying an oath of allegiance. The number of qualified voters required was one-tenth of the number of white votes cast in the Presidential election of 1860.[16]

On the 26th day of January, 1864, Governor Johnson, complying with a strenuous party demand, issued a proclamation for the election of local officers wherever the Federal authority had been established. All white males twenty-one years of age, and for six months resident in the State, were to be allowed to vote on taking an oath of allegiance more stringent than the one prescribed by the President. Controversies over various questions prevented anything like a full

[16]Messages and Papers of the Presidents, volume VI, page 213.

vote even of those qualified, and so the election was a decided failure.

In May, 1864, the Unionists of Tennessee sent delegates to the national Republican Convention at Baltimore, who were seated and who assisted in nominating Andrew Johnson for the vice presidency.

On the 5th of September, 1864, a Union Convention met at Nashville to consider the subjects of the reorganization of the State Government and of holding a presidential election. In this Convention the advocates of extreme policies prevailed to such an extent, that the less radical Unionists were alienated and formed a separate organization, calling themselves "Conservatives."

On the 15th of September, Governor Johnson issued a proclamation, elaborating his plan of reorganization, and ordering elections to be held wherever it was possible to hold them. Where no officers should be elected, the Governor was to appoint them. The Constitution of 1834 was to be the law "so far as was expedient." The Governor was in doubt as to calling a presidential election, but early in September the Conservatives nominated a full set of McClellan electors, and in consequence of this, Mr. Johnson on the 25th of the same month, ordered a presidential election and left no doubt as to the success of his candidates by prescribing an oath of unparalleled severity. His opponents described this oath as one binding electors to vote the Republican ticket. The Conservatives pro-

tested, and sent a delegation to Washington, but Mr. Lincoln declined to interfere, foreseeing no doubt, that the vote of the State would not be counted. Thereupon the Conservative electors withdrew from the contest and the opposing candidates were chosen, but Congress passed a resolution rejecting the electoral vote of Tennessee and the President signed it promptly.

In November, 1864, Unionist committees in the three grand divisions of the State issued a call for a Convention to meet at Nashville, on the 19th of December following, the purpose being, as declared in the call, "to take such steps as wisdom may direct to restore the State of Tennessee to its once honored status in the national Union."[17]

The invasion of Tennessee by the Confederate army, commanded by General Hood, prevented the meeting of the Convention at the time designated, and the executive committee for Middle Tennessee renewed the call for the 8th day of January, 1865, but as that was Sunday, the Convention actually met on the 9th of January. Samuel R. Rodgers, of Knox County was made president, and invited all loyal men who were present to seats in the Convention. It was at once proposed that the body declare itself a Constitutional Convention, which was not provided for in the call, but a violent debate lasting two days, convinced the extremists that the chances were against them, and thereupon they appealed to the

[17]Acts of Tennessee, 1865, page II.

Governor, who replied that the people had the right to alter or abolish their government as they saw fit, and that any one might draw up resolutions which would become law when ratified by the people. Thus assisted, the advocates of immediate action prevailed. A committee had been appointed already, and had reported in favor of this plan, and had suggested what it considered proper amendments of the State Constitution. The amendments abolished slavery, and prohibited laws "recognizing the right of property in man." A schedule was attached to the amendments which characterized the declaration of independence of May 6, 1861, as an act of treason and insurrection, and as null and void; repealed the military league with the Confederate States; declared all acts of the Legislature after the 6th of May, 1861, void, and invalidated all State bonds and notes of the bank of Tennessee issued after that date. Two elections were provided for, the first on February 22d, to pass on the amendments, and the second, on March 4th, to choose a Governor and members of the Legislature.[18]

The following oath for electors was prescribed, in a resolution attached to the schedule.

"I solemnly swear that I will henceforth support the Constitution of the United States, and defend it against the assaults of all its enemies; that I am an active friend of the government of the United States,

[18]Acts of Tennessee, 1865, pages IV-V.

and an enemy of the so-called Confederate States; that I ardently desire the suppression of the present rebellion against the government of the United States; that I sincerely rejoice in the triumph of the army and navies of the United States, and in the defeat and overthrow of armies, navies, and of all the armed combinations of the so-called Confederate States; that I will cordially oppose all armistices or negotiations for peace with the rebels in arms, until the Constitution of the United States, and all the laws and proclamations made in pursuance thereof, shall be established over all the people of every State and Territory embraced within the National Union; that I will heartily aid and assist the loyal people in whatever measures may be adopted for the attainment of those ends; and further that I take this oath freely and voluntarily and without mental reservation. So help me God."[19]

At the February election 42 counties voted or made returns, the vote for the amendments being 25,293, and against them 48.[20]

On the 25th of February, 1865, Governor Johnson issued a proclamation declaring the amendments ratified and confirmed, and ordering an election of State officers on the 4th of March. In this proclamation the Governor said, "Complete returns have not yet been made as provided by the foregoing resolution,

[19]Acts of Tennessee, 1865, page VI.
[20]Miller's Official Manual of Tennessee, page 48.

but enough is already ascertained to place the result of the election beyond all doubt, and fully to justify the announcement that the following articles amendatory of the Constitution of the State and schedule thereto appended, have been adopted by the people." [21]

The Supreme Court afterwards declared the amendments effective.[22]

At the March election W. G. Brownlow, a strong man and bitter partisan but possessing many excellent qualities, was elected Governor, receiving 23,352 votes, while only 35 votes were cast against him. The Legislative ticket, all of which was voted upon throughout the State, received the same number of votes. The Legislature, pursuant to the schedule attached to the amendments of 1865, met on the second of April of that year, and the Governor was inaugurated on the 5th of April. Thus was civil government restored in Tennessee, after an interval of more than three years, but another year elapsed before the State was allowed representation in either branch of the Federal Congress.

It was the necessary policy of the party, now dominant, to maintain itself in power by disfranchising all who had supported the Confederacy, that is to say, at least two thirds of the white men of the state. Governor Brownlow with characteristic determination, avowed

[21] Acts of Tennessee, 1865, page IX.

[22] *Ridley* v. *Sherbrook*, 3 Coldwell's Tennessee Reports, page 569.

his purpose to carry out this policy, and called upon the General Assembly to enact the necessary legislation, and to supply him with adequate means for its enforcement. Without going further than is necessary into the details of the history of this period, whose events still excite no little feeling in the State, it may be said that many of the legislators were more radical than the Governor as shown by their debates and by their enactments.

Certain laws passed by them must be considered because they are connected directly with the development of the Constitution.

By chapter 16 of the Acts of 1865 the county court clerks were compelled to "keep a registration of voters" and to require proof under oath of the loyalty of every applicant.[23]

The Act was passed June 5, 1865, but the results of the August elections of that year, were unsatisfactory to the dominant party, and on May 3, 1866, an amended franchise law was passed further limiting the right to vote, and authorizing the Governor to appoint for every county in the State a commissioner of registration, whose duty it should be to register the names of all qualified voters, and to issue certificates to them. This action was delayed by the resignation of twenty-one conservative members whose places were filled by special elections.

These Acts were upheld by the Supreme Court in

[23]Acts of Tennessee, 1865, chapter XVI, section 6.

the case of *Ridley* vs. *Sherbrook*, 3 Coldwell 569, already referred to.

On the 25th of February, 1867, the Legislature returned to the subject in a still more strenuous mood, the two efforts already made to keep disloyal men from voting having failed of satisfactory results.

The Acts of 1865 and 1866 allowed only white men to vote, while the Act of 1867 impliedly extended the right to negroes, though it expressly declared that it should "not be so construed as to allow the colored man to hold office or sit on juries."[24]

It empowered the commissioners of registration to appoint all judges and clerks of elections, taking that right from the Sheriffs.[25]

The Act of 1866 required the applicant for registration to swear "solemnly," while the Act of 1867 required him to swear "most solemnly." At the same session the Legislature enacted that aliens who had resided more than one year in the United States, and more than six months in Tennessee, should have the right to vote in State, district and county, and "all other civil elections" provided they had declared the intention of becoming citizens of the United States and had not participated in the "late rebellion."[26]

A most extraordinary bit of "omnibus" legislation was chapter 36, of the Acts of 1866-7 which, in a little more than one page, amended, in important re-

[24]Acts of Tennessee, 1866-7, chapter XXVI.
[25]Acts of Tennessee, 1866-7, chapter XXVI, section 10.
[26]Acts of Tennessee, 1866-7, chapter XXXVII.

spects, the general laws of the State relating to six different subjects. The third section nullified the registration in Davidson County under the franchise Act of 1866, and the fourth authorized the Governor to set aside by proclamation the registration in any county, where it should appear to his satisfaction that "frauds and irregularities had intervened." These successive Acts, it was thought, effectually secured, the supremacy of the executive in all things connected with elections. But the Act last referred to was so effectively attacked on account of the variety and the incongruity of its subject matters, that on February 28, 1868, an Act was passed to "legalize the Acts of the Governor," done under it, and to confer upon him the power to remove commissioners and set aside registrations.[27]

The constitutionality of both Acts was questioned in the case of the *State* vs. *Staten*, 6 Coldwell, 233, and the Supreme Court held them unconstitutional and void, in so far as they authorized the Governor to set aside registrations or undertook to confirm such action by him.[28]

On February 20, 1867, was passed another Act, not less obnoxious to the disfranchised element, and not less disastrous, ultimately, to the fortunes of the party in power. This was an Act authorizing the Governor to organize and call into service a volunteer force to

[27] Acts of Tennessee, 1867-8, chapter LII.

[28] *State* v. *Staten*, 6 Coldwell's Tennessee Reports, page 254.

be known as the "Tennessee State Guards" to consist of "one or more" regiments from each congressional district, and to be composed exclusively of loyal men. This army was to be subject to the orders of the Governor when "in his opinion the safety of life, property or liberty, or the faithful execution of law" required it.[29]

The State Guard when organized contained many negroes, and the conduct of blacks and whites alike gave offense. There were other Acts of the Reconstruction Legislature evincing extreme partisanship and prejudice, but they are matters of general rather than of constitutional history. The franchise Acts and the State Guard Act produced important results in the Constitutional Convention of 1870. It is probable that the franchise Acts were the sole cause of section 17 of Article XI of the Constitution requiring all County offices created by the Legislature to be filled by the people or the County Court, while the militia law is responsible directly for that part of section 5, of Article III which requires legislative action for calling out the militia, and permits such action only in case of rebellion or invasion.

There was, from the first, substantial opposition to the franchise Acts and, generally, to the policy of the radical and controlling element of the Union party, within that organization, and this, became so strong

[29]Acts of Tennessee, 1866-7, chapter XXIV; see also Acts, 1867-8, chapter LXX.

that in the Spring of 1866 it led to a second effort by the radicals to have East Tennessee made a separate State. A Convention of the more extreme unionists of that section was held and forwarded a memorial to the legislature. The memorial was referred to a committee but the franchise Acts having been passed in the meantime, it was taken for granted that East Tennessee was satisfied and no final action was taken upon the memorial.

It soon became apparent that the extreme union element could not be successful in its efforts to maintain itself in power by disfranchising the great majority of the voters. The evident futility of the attempt provoked excessive action by the Legislature, which had, in this case, the usual result of such policies, that is to say, a tendency to defeat the purpose it was designed to accomplish. There was much dissatisfaction on account of the failure of the Tennessee Senators and Congressmen to obtain their seats. Congress was waiting for the ratification of the fourteenth amendment, to which there was strong opposition even among the Union men in Tennessee. On the fourth of July, 1866, the Legislature having been convoked by a proclamation of the Governor, met in extra session but there was not a quorum of the House of Representatives in attendance, and the Sergeant at Arms was sent out to arrest and bring in enough members to form a quorum. He made a number

of arrests, but at the time when the vote was taken in the House, upon the amendment, there was less than a quorum present, although two members were under arrest in one of the committee rooms. Finding it impossible to secure a quorum under the Constitution, or a two-thirds vote of all the members, as was required by law, the House adopted a resolution declaring a vote of two-thirds of the members present to be sufficient. A vote was taken and the speaker announced that there was no quorum, and there certainly was none, but an appeal was taken from this decision of the chair, and was sustained, and thus by a joint resolution adopted July 19, 1866, was accomplished the ratification of the fourteenth amendment of the Constitution of the United States by the Legislature of Tennessee.

Congress seems to have been satisfied with this ratification, or at any rate, the waiting Tennesseans were admitted to their seats in both houses, and Tennessee was again in the enjoyment of all the rights and privileges of statehood.

On the 31st of January, 1868, the Republican Legislature, removed all civil disabilities of negroes, and since that time they have enjoyed every right of citizenship in the State.[30]

In discussing the period of reconstruction the writer has endeavored to confine himself to facts that are related logically to the development of the Constitu-

[30]Acts of Tennessee, 1867-8, chapter XXXI.

tion, and to treat them dispassionately and fairly but without attempting to conceal his disapproval of much that was done. It is hardly possible yet to write of this period in the true historic spirit. Many of the actors in it still survive. The strong passions which it excited are not yet allayed and have descended, though, happily, with reduced intensity, to the present generation; a natural, but unprofitable inheritance. One thing there is that stands to the credit of the reconstruction administration and is of sufficient merit to offset many of its excesses. The public school law of 1867 was perhaps the best single act that has appeared on the statute books of the State in the last fifty years, and it is to be regretted exceedingly that its repeal followed the overthrow of the Republican party.[31]

The most unfortunate continuing result of the reconstruction period was the intensifying of sectional or divisional feeling in the State. The strength of the Republican party was in East Tennessee and the policies of the party were, with more or less justice, attributed to that section. We have seen that East Tennessee was, by a great majority, firmly for the Union, that it gave many thousands of soldiers to the federal army, and that both before and after the war its leaders engaged in movements to have it made a separate State. These things were resented, naturally, by the other divisions, but the antagonism was

[31]Acts of Tennessee, 1866-7, chapter XXVII.

intensified ten fold, by the policy of the reconstruction administration.

Indiscreet utterances may still be heard from men of both parties, and occasionally unwisdom asserts itself in suggesting a new state, although the time has passed when a man of standing might safely commit himself to such a scheme.

While the bitterness lingers, and folly or mistaken selfishness, now and then would revive it, the passing years are doing their work well, and the time is not far off when the people of Tennessee will be one in sentiment, as they are one in interest and in duty.[32]

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[32]The subject of Reconstruction in Tennessee is ably discussed in the following publications: First, an article by Ira P. Jones in the volume entitled: Why the Solid South? (Baltimore, R. H. Woodward & Co., 1890), page 169; Second, by R. L. McDonnald, American Historical Magazine, volume I, page 307; Third, by J. W. Fertig in a dissertation submitted to the University of Chicago, for the degree of Doctor of Philosophy, entitled "The Secession and Reconstruction of Tennessee," University of Chicago Press, 1898.

CHAPTER XII.

THE CONSTITUTION OF 1870.

The State having been re-constructed and restored to its place in the Union, remained under the control of the minority party, which was strong in East Tennessee, but included only an insignificant portion of the white population of the other divisions. At least two-thirds of the white voters of the State, representing an equal portion of intelligence, culture and property, were disfranchised, and a condition so unnatural, could not have continued long under any circumstances. Its termination was hastened by the increasing dissatisfactions of the conservative element of the dominant minority, and factional rivalries and jealousies speedily offered an opportunity, which was seized promptly, for the majority to recover their rights. In 1867, the conservative unionists nominated a candidate for Governor, but the issuance of a proclamation by the Governor, on the first of July of that year, giving notice that the State guard would be present in "rebellious localities to enforce the franchise laws," caused his withdrawal. In 1868, the famous "Ku Klux Klan" had become thoroughly organized, and the Legislature, having been convoked in special session, passed a law making participation

in its proceedings a felony punishable by fine and imprisonment. The Governor was authorized to increase the State guard, and to declare martial law at his discretion. Of these powers he availed himself promptly by placing several counties under military control. But all efforts to suppress the "Klan" were unavailing, and according to the best authority, its influence continued for some time to be salutary in the middle and western divisions of the State. It is hardly possible to declare unqualified approval of a secret organization maintained in direct violation of positive law, but it cannot be doubted that the "Ku Klux Klan," for a considerable portion of its existence, and while confining itself to its original design, was protective and beneficial. That it was continued longer than was necessary may be true, and that toward the end of its existence, the more violent element in it, or outsiders who assumed its name and methods, were guilty of acts that are neither to be excused nor palliated, is certainly true.

In February, 1869, Governor Brownlow resigned, having been elected to the United States Senate, and D. W. C. Senter, Speaker of the State Senate, succeeded him and was a candidate before the Republican Convention in that year. His opponent was William B. Stokes. The Convention disagreed, the conservative element nominating Senter, and the radical element Stokes. The disfranchised Southern men, including members of the old Whig party, as well as the Demo-

crats, combined to support Senter on account of his conservatism, and partly by methods that were not technically regular, though perhaps necessary, and certainly of salutary effect, their practical enfranchisement was accomplished, and Senter was triumphantly elected. At the same time a Legislature was chosen in which the Democratic or Confederate element had a majority of both houses. This body undertook at once the repeal of the objectionable legislation of the Republican administration, but its most important action was to authorize the people to call a Constitutional Convention at an election in which all male citizens twenty-one years of age were entitled to vote without presenting any certificate, or establishing any other than the foregoing qualification. The Convention, which was called by a popular majority of over forty thousand, was really a political expedient for the purpose of restoring the citizenship of the majority of the white voters of the State, and securing to them the control of affairs which justly belonged to them, and perhaps, also of giving them an opportunity to show that they accepted the results of the war. Public offices were filled by men elected or appointed under the Republican regime, who were, in most instances, members of the radical wing of that party, and the newly enfranchised majority was determined to wrest the State from their control, being actuated by the conviction that the change was necessary to the public welfare.

The Convention of 1870 was thus produced by an extraordinary, unprecedented, and wholly unnatural condition of affairs, and was not called, as the Convention of 1834 had been, to adapt the Constitution to conditions created by the normal and healthy development of the community. The State had made steady progress from 1834 to 1861, but had not so far outgrown the Constitution as to make a new one necessary. The amendments of 1865, while proposed and adopted in the most irregular manner, were proper in view of the results of the war, and were sufficient to harmonize the Constitution of the State with that of the United States. The war had resulted in a ruinous destruction of values, and in the complete overthrow of the industrial system, but while the old order had been swept away, the new one had not been definitely established. The future was inscrutable and threatening, and the people were not yet in a position to reform their organic law so as to meet the demands which these great changes would inevitably create. That the Constitution, as it stood in 1870, was not in need of immediate amendment is very clearly shown by the fact that the Convention made hardly a single change of importance, which might not have been as effectively and as lawfully accomplished by a statute. Nevertheless, the Convention was called, and met at Nashville, on the 10th of January, 1870, while the drastic Federal policy of re-construction was in operation in most of the Southern states, and while, ab-

stractly considered, it was indisputably the wiser policy to await developments. It was, probably, the most intellectual body of men that ever assembled in Tennessee for any purpose. The president was General John C. Brown, who had been the leader of the Democratic party in the recent movements, a man whose abilities were of a high order, and who deserves a larger place in history than has been accorded him. The venerable Neil! S. Brown brought to the deliberations of the Convention ability, spotless character, and a ripe experience. James D. Porter has proved himself in many capacities one of the strongest, purest and best of our public men. Twice Governor of the State, and honored more than once by high Federal appointments, universally esteemed by the people of the State, he exhibits in his old age the best qualities of the Southern gentleman and statesman of the old school. John Netherland, one of the old Whig leaders held a prominent position in two generations of strong lawyers. John Baxter possessed extraordinary intelligence and force of character, was a lawyer of high standing, and a born leader of men. Joseph B. Heiskell, formerly a member of the Confederate Congress, and afterwards Attorney General of the State, was for nearly half a century one of the leaders of the bar of Tennessee. William H. Stephens, who with Heiskell represented Shelby county, was among the prominent men of the State, and was afterward strongly supported for the office of Senator. John F.

House was distinguished as an orator, and as a lawyer of large acquirements and practical ability. He was afterward prominent in the Congress of the United States, and it is to be regretted that indifference to public honors deprived the people of his services for the greater part of his active life. David M. Key, had been a gallant Confederate soldier, and was afterwards one of the Chancellors of the State, United States Senator, and Post Master General. A. O. P. Nicholson, probably, was the most distinguished delegate, and is one of the finest figures in our history, a man of commanding intelligence, of pure character, and of the most attractive personality. George W. Jones, had been one of the active and prominent members of Congress from the State before the civil war. Others who were distinguished by exceptional abilities and by public service were, W. H. Williamson, George E. Seay, J. J. Turner, Henry R. Gibson, W. B. Staley, John W. Burton, A. Blizzard, George G. Dibrell, A. W. Campbell, James Fentress, Thomas M. Jones, John A. Gardner, P. G. Fulkerson, John M. Taylor, D. N. Kennedy, W. V. Deaderick, and S. J. Kirkpatrick.

While the Convention was called, ostensibly, to reform the Constitution, its members were fully aware that this was not the principal purpose of their assembling. The leaders at least, were wise enough to know, that even if the real business of the Convention had been to revise the Constitution, the true policy was

to do as little as possible. They knew that they were at the beginning of a new era, and that the near future must bring many changes which they could not then foresee. The sentiment of the dominant element was very accurately declared by the venerable Judge Nicholson, who said repeatedly to those who were inclined to be extreme "Let us be careful; let us do no more than is absolutely necessary. In ten years from now all this must be done again."[1]

There were hot heads and theorists in the Convention, but the conservative majority adopted and steadily adhered to the policy declared by Nicholson. There were abundant reasons for caution. The Convention owed its existence to a stroke of political policy which was little less than audacious; the party whose supremacy in the State was to be destroyed, naturally, was opposed to it; the Federal government was exercising throughout the South the most extraordinary powers in reconstructing the recently rebellious States, and its agents kept vigilant watch on the proceedings. At one time it looked as if the Federal authorities would interfere, but, probably, there was no real danger. A resolution had been introduced by Governor Porter providing that nearly all public offices should be vacated at a specified time.

[1] I quote Judge Nicholson on the authority, and with the consent of his son, Major Hunter Nicholson. Judge Henry R. Gibson, a prominent member of the convention, confirms the statement and says that, at first it was expected that the Convention would not be in session more than ten days.

The resolution was finally adopted, but pending its consideration, a member of the Convention received a letter from a representative of the State in Congress, saying that if the proposition should be adopted, the reconstruction of the State would inevitably follow, that no action of that kind was then contemplated, but that Congress would not consent to the wholesale ouster of Republican office holders. To this letter, Governor Porter dictated a reply to the effect that the author of the measure declared that no Congress, however radical, would interfere when it was known that three-fourths of the office holders affected had been elected by excluding from the polls the intelligence and the property of the State; that even if reconstruction should be attempted, he defied Congress to make matters worse than they had been since 1865, and that the proposition would be made a part of the Constitution.[2]

The adoption of the resolution failed to produce the threatened retaliation.

An examination of the work of the Convention will show how carefully it adhered, in essentials, to the policy of "how not to do it." Section 4 of the declaration of rights was amended so as to provide that no political or religious test, other than an oath to support the Constitution of the United States, and of the State, shall be required as a qualification for office. To section 5 of the declaration the following words

[2]Letter from Governor Porter to the writer.

were added: "The right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto, except upon a conviction, by a jury, of some infamous crime, previously ascertained and declared by law, and judgment thereon by a court of competent jurisdiction." Section 6 was amended so as to prohibit any political or religious test as a qualification for jurors. These changes were intended to be preventive of the recurrence of recent conditions in the State, and the same purpose prompted an amendment of section 25 of the declaration of rights, to the effect that martial law is inconsistent with the principles of free government, and that no department of the State government is authorized to establish it. The right to bear arms was qualified by the declaration that the Legislature should have power, by law, to regulate it with a view to the prevention of crime.

The Constitution of 1834 prohibited the suspension of the writ of *habeas corpus* except when required, in case of rebellion or invasion, by the public safety, but now the General Assembly must declare that the necessity exists. Section 18 of the declaration of rights was changed so as to prevent imprisonment for debt in civil cases. The amendments of 1865 constitute two sections of the declaration of rights, and the Convention added another requiring the erection of safe and comfortable prisons and the humane treatment of prisoners. The section affirming the right of settlers south of the Holston and French Broad to the pre-

emption and occupancy of their lands was omitted, but William Blount's declaration of the right to participate in the free navigation of the Mississippi was retained.

The amendments of article II of the Constitution, which deals with the Legislative department, were few, and with two exceptions, unimportant. Section 2 of 1834 provided that two-thirds of each house should constitute a quorum, and this was so amended as to declare that "not less than two-thirds of all the members to which each house shall be entitled," shall constitute a quorum. A much more important, and a really meritorious amendment, was that of section 17 of this article providing, that no bill shall become a law which embraces more than one subject, that subject to be expressed in the title, and that all Acts which repeal, revive or amend former laws, shall recite in the caption or otherwise, the title or substance of the law repealed, revived or amended. It had been the custom up to this time to include more than one subject in an Act, and very often a number of incongruous matters were legislated upon in a single bill. Frequently, Acts had been passed extending to private or municipal corporations the same powers conferred upon other similar corporations by former legislation, leaving the powers thus conferred to be ascertained by reference to the former Acts. Of much less importance was the amendment of section 20 of this article, declaring that no law of a general nature shall take

effect until forty days after passage, unless it be stated in the Act, or in its caption, that the public welfare requires it to take effect sooner.

Section 28 of this article was changed so as to read as follows: "All property, real, personal, or mixed, shall be taxed; but the Legislature may except such as may be held by the State, by counties, cities or towns, and used exclusively for public or corporation purposes, and such as may be held and used for purposes purely religious, charitable, literary or educational; and shall except one thousand dollars worth of personal property in the hands of each taxpayer, and the direct products of the soil in the hands of the producer or his immediate vendee. All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that all taxes shall be equal and uniform throughout the State. No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of the same value. But the Legislature shall have the power to tax merchants, peddlers and privileges in such manner as they may from time to time direct.

"The portion of a merchant's capital used in the purchase of merchandise sold by him to non-residents, and sent beyond the State, shall not be taxed at higher rate than the ad valorem rate on property. The legislature shall have the power to levy a tax upon in-

comes derived from stocks and bonds that are not taxed ad valorem.

All male citizens of this State over the age of twenty-one years except such persons as may be exempted by law on account of age or other infirmity, shall be liable to a poll tax of not less than fifty cents nor more than one dollar per annum. Nor shall any county or corporation levy a poll tax exceeding the amount levied by the State."

The most important additions to this section were the grant of authority to levy taxes on incomes, and the exemption of a thousand dollars worth of personalty from taxation; the other changes being, in the main, amplifications of the original section without any change of principle.

Section 31 of this article, originally, regulated the power of the Legislature to emancipate slaves, and instead of this there was inserted a prohibition against lending or giving the credit of the State in aid of any person, corporation or municipality, and against the acquisition by the State of stock in any bank or other corporation. It was further provided that no bonds of the State shall issue to any railroad company which at the time of its application shall be in default in paying interest on State bonds previously loaned to it, or that shall have sold any State bonds for less than par after the adoption of the new Constitution, and before such application. With obvious reference

to the recent adoption of the 14th amendment, it was ordered that no Convention or General Assembly shall act on any amendment of the Constitution of the United States unless elected after the submission of the amendment by Congress to the States.

Article III, dealing with the executive department received only one important amendment, in the addition to section 5, which defines the power of the Governor in calling out the militia, of the following words: "But the militia shall not be called into service except in case of rebellion or invasion, and then only when the General Assembly shall declare by law that the public safety requires it." This provision was intended to prevent such uses of the militia as had been made under the Republican administration, and not only accomplished its purpose, but, as events have proved, went further than was altogether desirable. Chapter 149 of the Acts of 1893, invests the Governor with the power to repel invasions and suppress insurrections, mobs, and other unlawful assemblages, and declares that for this purpose he shall have power to call to his aid the sheriff of any county and any number of citizens, or that he may summon the State guard of Tennessee, "which for purely State purposes, is declared and shall be known as the Army of Tennessee, and of which, considered as a military band, the Governor is Commander in Chief." The immediate cause of this most extraordinary act, was an insurrection of miners at Coal Creek, in East Ten-

nessee. It is a palpable evasion of the Constitution of the State, and is probably even more obnoxious to the Constitution of the United States, and Tennessee is the only State in the Union that has an army as distinguished from the militia. The act may be condoned as an emergent and indispensable measure, but it would be difficult to suggest any legal justification of it. Section 18 of this article gives the Governor a veto, but a majority vote overrides it.

Section one of article IV extends the suffrage to all male citizens of the State over the age of twenty-one years, upon proof of the payment of poll tax, for such preceding period as the Legislature may prescribe. Article V on the subject of impeachment, was amended so as to provide that the Chief Justice of the Supreme Court, or, if he be on trial, the Senior Associate Judge, shall preside over impeachment trials. The Treasurer and the Comptroller were made subject to impeachment, and the Legislature was specially authorized to release from the penalties imposed, any person disqualified from holding office by the judgment of the court of impeachment. This last provision is directly related to the impeachment of Judge Frazier of Nashville, who had been removed from office for granting a writ of *habeas corpus* to members of the House of Representatives who had been arrested in the effort to secure a quorum for the approval of the 14th amendment of the Constitution of the United States, by the Legislature.

In dealing with the judicial department in article VI, the Convention named the Circuit and Chancery courts expressly, thereby making them constitutional courts. The second section of the same article provided for a Supreme Court of five Judges, not more than two to reside in any one of the grand divisions of the State, the Judges to designate one of their own number to preside as Chief Justice. In the schedule, it was provided that at the first election of Judges under the Constitution, six should be elected, two from each grand division, but in the event of a vacancy, at any time after the first of January, 1873, the Court was to consist thenceforth of five Judges. This contingency occurred in the death of A. O. P. Nicholson in 1876, and since that time the Supreme Court has consisted of five members, and continues to hold sessions at Knoxville, Nashville and Jackson, annually. The term of service of all Judges continues to be eight years. The election of the Attorney General and Reporter for the State was taken away from the people, and confided to the Supreme Court, and the term extended from six to eight years. Section 6 of article VI, authorizing the removal of Judges and Attorneys for the State by concurrent action of both houses of the General Assembly, was continued with an amendment requiring the concurrence of two-thirds of "the members to which each house may be entitled," instead of two-thirds of the members elected. Section 10 of article VI confers upon inferior courts

of equity, the powers already possessed by courts of law, to issue writs of *certiorari* for cause.

A provision for the appointment of special Judges was made in the following form: "The Legislature may by general laws, make provision that special Judges may be appointed to hold any court, the Judge of which may be unable or fail to attend or sit, or hear any cause in which the Judge may be incompetent." Section 3 of article VII makes the Comptroller a constitutional officer.

The Constitution of 1796 prohibited the formation of new counties with less than six hundred and twenty-five square miles, or the reduction of old counties below that area. The Constitution of 1834 fixed the minimum area of new counties at three hundred and fifty square miles, and required them to have four hundred and fifty qualified voters, but did not allow the reduction of old counties to less than six hundred and twenty-five square miles; but the Constitution of 1870 provides that new counties may be established to consist of not less than two hundred and seventy-five square miles, with a population of seven hundred qualified voters.

The provision that all laws and ordinances in force in the State should continue in effect is retained, but ordinances contained in any former Constitution, or the schedule thereto are abrogated. The method of amending the Constitution was modified, by the following clause: "The Legislature shall have the right

at any time by law, to submit to the people the question of calling a Convention, to alter, reform, or abolish this Constitution, and when upon such submission, a majority of all the votes cast shall be in favor of said proposition, then delegates shall be chosen, and the Convention shall assemble in such mode and manner as shall be prescribed."

One of the most important amendments adopted was to the effect that no corporation shall be created, or its powers increased or diminished by special laws, but the General Assembly shall provide by general laws for the organization of all corporations hereafter to be created, which laws may, at any time, be altered or repealed; but no such alteration or repeal shall interfere with or divest, rights which have become vested.[3]

Th Constitution of 1834 had provided that the Legislature should have power to grant charters to corporations as it might deem expedient for the public good.

Section 11 of article XI of 1870 created a homestead exemption of the value of a thousand dollars in land and improvements, the exemption under the Code of 1858 having been of the value of five hundred dollars.

Additional provision was made for a school fund by directing that State funds derived from polls be dedicated to educational purposes as the Legislature

[3]Article XI, section 8.

might direct, and it was added that no school established or aided by this section shall allow white and negro children to be received as scholars together.[4]

Section 12 of article XI empowers the Legislature to enact laws for the protection and preservation of game and fish within the State and to make such laws applicable to particular counties or districts. Section 14 of the same article prohibits the intermarriage of white persons with negroes, mulattoes or persons of mixed blood descended from a negro to the third generation, and further forbids their living together as man and wife in this State. A wise and liberal clause was inserted releasing all persons from public service in time of peace on any day set apart by their religion as a day of rest. This was done upon a memorial presented by a number of Jews.[5]

The schedule provided that the courts should fill all offices subject to their appointment, during the first term held by Judges elected under the Constitution, and that all other officers should vacate their places thirty days after the date fixed for the election of their successors.

The people voted upon the new Constitution on the 26th of March, 1870, and on the 5th of May of that year, the Governor issued a proclamation declaring that returns had been received from all the counties except four, and that the vote stood for the new Con-

[4]Article XI, section 12.
[5]Journal, Constitutional Convention, 1870, page 389.

stitution 98,128, and for the old Constitution 33,872, a majority of 64,256 in favor of the new Constitution.

The Convention was in session from January 10th to February 23d, 1870, and would have been able to complete its work in a much shorter time, but for the critical attitude of many of its members as to minor points of nearly every clause of the Constitution. So far as the larger principles were concerned, there was but little room for disagreement, but the journal shows a disposition on the part of the able lawyers, of whom there were so many in the Convention, to insert amendments, that were only critical or explanatory comments upon the original text. The ability and the mental activity of the members, thus retarded the work. In several instances, as we have seen, efforts to make verbal and refining changes were successful, and were the more readily approved because it was the natural desire of the delegates that their work should justify the calling of the Convention. They recognized the inexpediency of making material amendments but did not wish to adjourn without doing something.

A few of the amendments were important, and while nearly all that are entitled to be so characterized, might as well have been enacted as statutes, it was desirable that some of them should have the most permanent form. The intermarriage and the co-education of the races are subjects with which the Legislature would have dealt, undoubtedly, as the Convention did, but it is well that they were acted upon definitely and finally,

by the Convention. The prohibition of "omnibus" bills was eminently wise, and the method established for granting charters of incorporation has worked satisfactorily and beneficially. If it be conceded that game and fish are not too much dignified by being considered in the Constitution, it may be said that the Legislature might have passed the necessary laws without express authority. There was too much special legislation by the Convention on the subject of counties, which may be excused however, on account of the astonishing number of memorials on the subject that were presented. It became necessary to appoint a special committee on new counties and county lines, and hardly a day passed without the presentation of the subject in some form.

Strong reasons may be presented for the appointment of the Attorney General and Reporter by the Supreme Judges, but there is an obvious inconsistency in allowing the people to elect the Judges and not allowing them to elect the Attorney General. Observation and experience, no less than reason, seem to support the proposition that the people should elect all their officers. The Attorney General is a part of the judicial establishment, and an elective State judiciary is the only logical one, whatever may be said as to the Federal Judges.

The gravest difficulty encountered by the Convention was in the adjustment of the suffrage. The chairmanship of the committee on elections and the

right of suffrage was assigned to Judge Nicholson, in whose prudence and wisdom his associates had the utmost confidence. The result was the re-enactment of the provision of the old Constitution with the elimination of the word "white," and the addition of the poll tax qualification. The way to this conclusion lay through much strenuous debate, many conflicting and fervid resolutions, and not a few "solemn" protests. The journal shows many rejected resolves, asserting the superiority of the white man, and his right to supremacy, prophesying dire evils as results of allowing the negro to vote, and predicting the political extinction of delegates who should favor a policy so iniquitous. Some would have denied the negro the right to vote, but the most important division was on the question of submitting the subject to the people as an independent proposition.[6]

The position of the irreconcilable minority is stated in a protest filed by four members on the 22nd of February, as follows: "We hold that this Convention has no right to force negro suffrage upon the people of Tennessee."[7]

A strange spectacle was presented when many southern men who had been expected to be extreme advocates of white supremacy, took the floor in support of provisions which necessarily conferred the suffrage upon the negroes. The policy was wise, and

[6]Journal, Constitutional Convention, 1870, page 160.
[7]Journal, Constitutional Convention, 1870, page 398.

in fact, unavoidable. No other course was open, and any of the restrictive measures which were proposed, inevitably would have been disastrous in its results. The Convention acted wisely also in settling the question itself instead of submitting a separate proposition to the people, the passions engendered by the war being as yet but little abated, having been kept alive, and intensified, by the policy of the Republican administration.

The poll tax clause caused much debate, and the opposition was not confined to the Republicans, although the delegates belonging to that party were active against it.

A protest was presented by Henry R. Gibson, a Republican leader, on January 29th, in which it was affirmed, in effect, that suffrage was a natural right, and not a privilege, and could not lawfully be bestowed upon the rich in preference to the poor; that the right to restrict the elective franchise implies the right to destroy it; that the poll tax clause was an unjust discrimination against the poor man, and a property qualification in disguise; that it would give the rich candidate an unjust advantage over the poor one, and would disfranchise many voters; that it would enable partisan Judges to commit frauds, and would be productive of contests and strife in elections.[8]

Four other members signed this protest, and on the last working day of the Convention, Mr. Netherland,

[8]Journal, Constitutional Convention, 1870, page 179.

a conservative Democrat, presented written objections less elaborate, but of similar import, in which seven other members joined.[9]

The establishment of this qualification seems to have been considered very generally among the members before the meeting of the Convention, and was proposed on the second day of the session in different forms by Neill S. Brown and John Baxter, two of the most influential delegates.[10]

No subject, except the extension of the suffrage to the negroes received more attention. The law is not objectionable in principle, perhaps, but existing statutes which allow the payment of poll tax at any time before a vote is offered, should be amended, and the payment of the tax within a specified time required. It has been the custom in certain localities to have deputy trustees at the voting places to receive poll taxes at the last possible moment, and campaign funds have been applied freely in supplying delinquents, who, as a rule are not indigent, but indifferent or penurious, or, it may be, venal.

The Constitution does not command the Legislature to establish a poll tax qualification, but permits it to do so, and makes compliance with the statute, when passed, indispensable.

The first legislation upon the subject was in 1890. By this act, the voter, if subject to poll tax, was re-

[9]Journal, Constiutional Convention, 1870, page 397.
[10]Journal, Constitutional Convention, 1870, pages 20 and 22.

quired to present to the judges of election satisfactory evidence that he had paid the tax for the year next preceding the election.[11]

This provision being altogether indefinite as to the kind of proof required, was amended in 1891 by specifying the method of making proof. The original receipt of the trustee was the primary evidence, but if lost after delivery, the affidavit of the voter to that effect, filed with the Judges was sufficient.[12]

This, upon trial did not prove to be satisfactory, or adequate, and in 1899 it was enacted that if the name of the voter appeared on a certified list to be furnished by the Trustee to the chairman of the Board of election commissioners, and by him to the officers at the several voting places, this should be accepted as proof of the payment of the poll tax. This is in addition to the method prescribed by the Act of 1891.[13]

Certain curious survivals of opinion appear in the journal of the Convention, such as propositions to require a belief in the divinity of Christ as a condition to holding a civil office, to make all voting *viva voce,* and to prohibit all others than one ad valorem tax.

An effort to create the office of Lieutenant Governor failed, as in 1834, as did many propositions to change the terms of office. Certain prominent delegates would have made the Governor's term four years,

[11]Acts of Tennessee, 1890, Extra Session, chapter 26.
[12]Acts of Tennessee. 1891, chapter 222; Acts of Tennessee, 1891, Extra Session, chapter 23.
[13]Acts of Tennessee, 1899, chapter 402.

and one of these would have had State Senators elected for nine years.[14]

A strong disposition to modify, or at least to criticise, the judicial system, failed of important effect, except as to the manner of electing the Attorney General and Reporter. One delegate desired a court of errors and appeals, and three supreme courts,[15] while another would have had three regular, and three temporary Judges, of the Supreme Court, the last to serve until the cases accumulated on account of the war should be disposed of.[16]

More earnestly advocated was the plan of confiding the selection of all Judges and Attorneys General to the Governor, subject to the approval of the Senate, which was proposed and ably supported by W. B. Staley, who afterwards as an equity Judge, displayed abilities that have hardly been surpassed in the State's judicial history. Ten of the eleven members of the judiciary committee concurred in a report favoring an amendment making Supreme Judges appointive by the Governor with the consent of two-thirds of the Senate, for a term of twelve years; inferior Judges elective by the people of their circuits or districts for ten years, and the Attorney General and Reporter appointive by the Supreme Judges for twelve years.[17]

[14]Journal, Constitutional Convention, 1870, pages 83 and 110.

[15]Journal, Constitutional Convention, 1870, pages 149 and 214.

[16]Journal, Constitutional Convention, 1870, page 217.

[17]Journal, Constitutional Convention, 1870, page 124.

This report would have created five Supreme Judges, but the provision was not to become effective until November, 1871, and meanwhile the Governor was to appoint four temporary Supreme Judges, who with the three permanent Judges then incumbent, were to constitute the Supreme Court until that date.[18]

The purpose of this last provision is obvious.

At a later date, Thomas M. Jones offered a resolution to the effect that Judges and Attorneys General be appointed by the Legislature, as under the first Constitution.[19]

Neill S. Brown moved that Supreme Judges be appointed by the Governor with the consent of the Senate, and inferior Judges and Attorneys General elected by the people.[20]

Mr. Thompson of Davidson county would have had the Supreme Judges appointed by the Governor, the Attorney General and Reporter appointed by the Supreme Court, and inferior Judges and District Attorneys elected by the people, and nearly one-third of the delegates favored this plan.[21]

Mr. Burton of Rutherford, favored a Supreme Court of five Judges one to be elected by the voters of each grand division, and the remaining two appointed by the Governor, and confirmed by the Senate.[22]

[18]Journal, Constitutional Convention, 1870, page 126.
[19]Journal, Constitutional Convention, 1870, page 207.
[20]Journal, Constitutional Convention, 1870, page 207.
[21]Journal, Constitutional Convention, 1870, page 207.
[22]Journal, Constitutional Convention, 1870, page 209.

The motion that the Supreme Judges be elected by the qualified voters of the State was made by Joseph B. Heiskell, of Shelby County, chairman of the judiciary committee, and was adopted by a vote of forty-six to twenty-five.[23]

The motion, however, does not seem to have represented Mr. Heiskell's opinion, and probably was offered as a compromise. Among those opposing it were such men as Baxter, Neill S. Brown, John F. House, Key, Nicholson, Staley and Stephens. The Republican members nearly all favored the election of the Judges by the people, while the Democrats divided almost equally.

It is not easy to account for the reactionary sentiment displayed in this matter, except upon the theory that disturbed political conditions in the State, and, especially, apprehension of the untried strength of the negro vote, influenced the opponents of popular election. Certain of the members, including Baxter and Staley, are known to have favored the appointment of Judges without reference to existing conditions. Undoubtedly the Convention reached the proper conclusion, except in the matter of the election of the Attorney General and Reporter. The willingness of so large a part of the delegates to take the election of the Judges away from the people after it had been conferred upon them by the amendments of

[23]Journal, Constitutional Convention, 1870, pages 218-219.

1853, showed great confidence that, on account of prevailing conditions, the work of the Convention would be approved by the people, and it is very certain that there will never again be a Constitutional Convention in the State which will be so nearly independent of popular opinion on a matter of this kind.

A motion to reduce the salaries of Judges of the Supreme Court to $2,500, and all inferior Judges to $2,000, fortunately failed. Two resolutions were introduced by different members providing for the election of the Secretary of State, Treasurer, and Comptroller, by popular vote,[24] while another, going to the opposite extreme, would have vested the appointment of the Secretary of State in the Governor, subject to the approval of the Senate.[25]

The provision of the Constitution of 1834 upon the subject of private laws had not been effective, but the Convention of 1870 failed to approve a resolution divesting the Legislature of the power to pass such laws and vesting it in the courts. The proposition was not a well considered one, but illustrates the defects inherent in our system in the matter of local self government. Mr. Kirkpatrick deserves honorable mention for introducing a resolution, which, unfortunately, was rejected, providing that the property and the money rights of married women at the time of

[24]Journal, Constitutional Convention, 1870, pages 34 and 75.

[25]Journal, Constitutional Convention, 1870, page 53.

marriage, or acquired afterwards in any way, should not be subject to the debts of the husband, and directing that laws be passed providing for the registration of the wife's separate property. In nothing are our laws more unjust than in the matter of the property and contract rights of married women, although, since 1870, the courts have been accomplishing, with good intention, but slowly and inadequately, what might have been done effectually by the adoption of this resolution.[26]

It is surprising to find one delegate calling for a report of the finance committee upon the expediency of re-chartering the Bank of Tennessee.

Mr. Heiskell of Shelby County, introduced a resolution permitting the exemption of new manufacturing establishments from taxation for a period not exceeding ten years, and making their profits subject to a special tax, but it was rejected by a vote of twenty-seven to forty-four.[27]

Thirteen of the leading members of the Convention united in a protest against that feature of section 28 of article II, which authorizes the legislature to tax merchants in such manner as it may from time to time direct. The protest declared that the corresponding clause in the Constitution of 1834 had been used continually to "discriminate" grievously against a portion of our citizens, to overrate them with burdens,

[26]Journal, Constitutional Convention, 1870, page 191.
[27]Journal, Constitutional Convention, 1870, pages 272-274.

from which others are protected, by taxation amounting to from ten times to one hundred times the amount imposed on other citizens on the use of the same amount of property or capital."[28]

The protest declared the policy in question to be odious, abhorrent to the sense of justice, and calculated to depreciate the interests of trade and commerce. Abstractly considered, the protest was well founded, but the State had been committed, for years, to the policy and has adhered to it to the present day, making free use of the Legislative power to create privileges.

The removal of the republican office holders naturally excited the disapproval of the representatives of that party in the Convention, which was strongly expressed in a protest presented by Henry R. Gibson[29] in which it was declared that the doctrine that the amendment of the Constitution vacated every office in the State not expressly excepted, was a political heresy; that the vacation of the offices was not a question before the people when the delegates were elected, and not a part of the "province" of the Convention; that the vacation of the offices of Judge, Chancellor, and States Attorney was a direct violation of political faith, such offices having been filled recently by a popular election demanded and brought on by those who now sought to vacate them, before

[28]Journal, Constitutional Convention, 1870, page 301.
[29]Journal, Constitutional Convention, 1870, page 253.

they had been "fully warmed by their new occupants."[30]

With a naturally increasing intensity, as it progressed, the protest declared the vacation of the offices of Justices, Court Clerks, and Registers, to be an act of littleness, and of persecution, and affirmed that such action would be considered by the Republicans as a direct partisan blow at them, prompted by a desire for party vengeance. This not being sufficiently strenuous, it declared that the vacation of the offices was the "basest ingratitude" to the members of the Republican party who had made the Convention possible by putting the ballot in the hands of the disfranchised; that it was in violation of all good precedents, an ex parte judgment of condemnation pronounced alike upon the just and the unjust, an act of tyranny, in violation of the Constitution of the United States, which would make the North distrust the South, would be deemed a proclamation of war, against Union men, discourage immigration, prevent the investment of capital, postpone the general removal of disabilities by Congress, give additional reasons for Federal intervention, and delay the return of peace and harmony, and the ultimate restoration of the Union.[31]

Happily these predictions were not fulfilled.

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[30]Journal, Constitutional Convention, 1870, pages 253-254.
[31]Journal, Constitutional Convention, 1870, 253-254.

CHAPTER XIII.

THE CONSTITUTION OF 1870—Continued.

When Judge Nicholson, the Nestor of the Convention of 1870, declared that within ten years it would be necessary to revise the Constitution again, his associates, apparently, agreed with him, and shaped their course accordingly, and yet thirty-five years have elapsed and not a single change has been made.

This does not prove that the members of the Convention were wrong, in believing that before long a new Constitution would be needed, and they could not anticipate that a majority of the people would be, apparently, without interest in the subject; that demagogues would be heard to oppose a Constitutional Convention on the ground of expense; that powerful corporate interests would band themselves against it, and that all who held office would antagonize it. The members of the Convention were men of the old regime, who had passed their lives in slaveholding, agricultural Tennessee, and who seeing many changes made, and many impending, admitted their inability to provide for a future of unknown, but certainly new, conditions. The slave had become the political equal of his former master; the white man was impoverished; disorder, poverty, and calamity

were on every hand; a new industrial system was to be built up; and a new distribution of lands, and a general social, political and industrial re-adjustment to be made. Wisely admitting its own limitations, the Convention left to a later generation the duty of adapting the organic law to the new conditions. The time has come when that duty should be done. A short survey of conditions in the State will discover abundant reasons for calling a Constitutional Convention, and for a more extended revision of the organic law than was made in 1834, or in 1870. The present Constitution, as has been shown, is not different in any vital respect from the Constitution of 1834. The tremendous social and industrial changes that have occured since 1834, and indeed since 1870, have created a necessity for revision, or for systematic disregard of the Constitution in important respects, despite the most liberal judicial constructions. This is especially true in view of the fact that the Conventions of 1834 and 1870, did not content themselves with enunciating general principles, but made the Constitution, a long and complicated statute, and in addition the Convention of 1870, laboring under apprehensions caused by unfortunate but temporary conditions, adopted certain restrictive rules, which in normal circumstances have operated injuriously. Of this last class is the militia clause already considered.

In 1897, the Legislature passed an Act authorizing the people to vote upon the question of calling a Con-

stitutional Convention. The election was held in August of that year, and resulted in the overwhelming defeat of the proposition. The Democratic party was in control of the Legislature when the Act was passed, and of the State when the election was held. Long before the election it became apparent that the Convention would not be called. The office holders of the State, with practical unanimity opposed it, and, as these were mainly Democrats, the proposition failed to receive the support of the dominant party, while the Republicans voted against it because it had originated in a Democratic Legislature, and because it was believed that a Constitutional Convention would adopt additional measures to regulate the right of suffrage among the negroes.

The Legislature of 1903, which was controlled by the Democrats, passed an Act submitting to the voters of the State the question of amending the Constitution so as to make the Governor's term of office four years, to provide for the election of the Secretary of State, the Treasurer and the Comptroller by the people; to make the terms of Sheriffs and Trustees four years; to allow laws to be passed, for certain districts, regulating the establishment and maintenance of public roads, and fences, and to control domestic animals; to exempt persons, firms, and corporations, beginning the business of manufacturing, from taxation for a period not exceeding ten years, upon certain conditions, and to limit the in-

debtedness of cities, counties, and towns to ten per cent of the value of the taxable property in them.[1]

These amendments were voted upon severally in the general election in the year 1904, and were, without exception, rejected by large majorities.

Thus the people of the State have declared twice, their indifference, or their objection, to the alteration of the Constitution. In the election of 1904, there was organized opposition in the Democratic party to the amendments, although the Act submitting them may be characterized properly as a measure of that party. Certain of the opponents of the amendments declared that they voted against them from the conviction that the entire Constitution needed recasting and, therefore, it was undesirable to undertake its revision piecemeal. If the controlling cause of the opposition be sought, it will be found that again the office holders of the State constituted the principal obstruction, although those directly affected by the amendments proposed, must be excepted from this declaration. The results of these two attempts are discouraging to the advocates of constitutional revision, but they do not express accurately the state of opinion on the subject. There is a strong and a growing sentiment in favor of a new Constitution, based, mainly, upon the facts which are now to be considered.

Among the most objectionable features of our State government is the County Court as at present consti-

[1]Acts of Tennessee, 1903, chapter 532.

tuted. This court is one of the institutions of the State recognized by the Constitution, and treated by the courts and lawyers as indestructible so long as the present Constitution stands.[2]

On the other hand it has been held that the County Court is a creature of statute entirely, so far as its powers are concerned.[3]

It is possible to conclude, as a legitimate inference from the later cases on the subject, that the County Courts, while they may not be abolished, may be deprived of all judicial powers, but this cannot yet be asserted, as to administrative powers and rights, such as they enjoyed before the adoption of the first Constitution. It is desirable that the County Court should be abolished. It has been shorn already of judicial powers, to a considerable extent, and many of those remaining have been confided exclusively to the County Judge. The Court is wholly unsuited as a body, to the discharge of judicial functions, and is not less unfit for the performance of administrative duties. It is composed of all the Justices of the County, and as a rule, almost without exception, its members are untrained not only in the law, but also in public business. Speaking generally, the Justices do not represent the progressive element of the com-

[2]Pope v. Phifer, 3 Heiskell's Tennessee Reports, page 691. *Redistricting Cases*, 111 Tennessee Reports, page 285.

[3]*Railway* v. *Wilson County*, 89 Tennessee Reports, page 600. *The Judges' Salary Cases*, 110 Tennessee Reports, page 388.

munity, and the centres of population, and of business are not allowed a fair representation. It may be admitted that the justices are usually men of fair character and right purposes, but the inefficiency of the system has been recognized for many years by the intelligent people of the State, and there is a strong, well founded, and growing sentiment in favor of abolishing it. A County government composed of a few capable men, possessing no judicial powers, should be substituted for it, and it may be predicted confidently, that ultimately a reformation of this kind will be accomplished. Already the Legislature has passed several acts, reducing the number of justices in certain counties, and it is possible that the process thus begun may be continued until the number everywhere shall be reduced to a reasonable limit, but this cannot go on indefinitely, for while it is clearly admissible to reduce the number of justices wherever it is now excessive, the Legislature can hardly claim the right to abolish the County Court by indirection. The proper plan is to amend the Constitution, and rid the State of a cumbrous and injurious institution.

The increase of population and changed social and industrial conditions, have demonstrated the existence of the most serious defects in the Constitution, and the necessity for material modifications of local government and institutions. Southern statesmen have been the special spokesmen of local self government, and yet it has been true always, that the South has

had less of this, than the other sections of the country, and that no southern State has had less than Tennessee. No one will now deny that in all well populated localities, outside the cities, the town or township, is the ideal unit of government in this country, and it is not to be found in the South except in embryo. Conditions were unfavorable to it at first, but these have changed and, in time, the South must follow the example of the West in adopting the township, each State modifying the system in accordance with its own particular conditions, and introducing it gradually if necessary. It has been demonstrated that there are many things that can not be regulated, properly, except under this system. Schools, local sanitation, fences, roads, and many other important matters of local police, should be controlled, at least as to details, by the civil districts, or townships, which should have a limited power of legislation. The experience of important and progressive States demonstrates the feasibility and the benefit, of combining with the county the essential features of the township. A discussion of details would be out of place here, but it is proper to mention certain facts which prove the inadequacy of our own methods of local government, and, at the same time, show the existence of reasons, peculiar to the State, for the general indifference to constitutional changes.

It will be remembered that special legislation was one of the public abuses most complained of under

the Constitution of 1796. Many of these special acts were unconstitutional, and not a few of them were set aside by the courts as obnoxious to section 8 of the Declaration of Rights, but the Convention of 1834, adopted as an additional preventive, section 8 of Article XI providing that: "the Legislature shall have no power to suspend any general law for the benefit of individuals, inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunities, or exemptions, other than such as may be, by the same law, extended to any member of the community, who may be able to bring himself within the provisions of such laws."

This section is in a sense the complement of Section 8 of the Declaration of Rights which provides: "that no man shall be taken or imprisoned, or disseized of his free hold, liberties or privileges, or outlawed or exiled, or in any manner destroyed, or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land." This was in the Constitution of 1796, was modified in 1834 so as to apply only to "free" men, and was restored to its original form by the Convention of 1870. Section 8 of Article XI, of 1834, as quoted, is in the present Constitution with an additional provision regulating the formation of corporations, which need not be considered here.

Section 8 of the Declaration of Rights is the familiar 29th chapter of Magna Charta, used in all Ameri-

can Constitutions to limit the powers of the Legislature.

In this connection it will be considered only as affecting the power of the General Assembly to legislate with reference to particular localities and classes. It was construed repeatedly by the Supreme Court of Tennessee, under the Constitution of 1796, in cases in which it was charged that statutes were not the law of the land because they were of limited application. The definition of the phrase "law of the land" commonly attributed to the court of that period, and appearing in the head notes of cases and in the digests, is: "a general and public law, equally binding upon every member of the community," but this is not a full statement of the holdings. In all the more important cases, the court used, in addition to the phrase just quoted, the words, "under similar circumstances,"[4] so that the complete definition was, a general and public law equally binding upon every member of the community in similar circumstances.

Thus section 8 of the Declaration of Rights forbids the imposition of burdens, duties, and obligations, except by laws which shall apply to all in like circumstances, while section 8 of article XI fixes the same limitations upon laws granting exemptions and im-

[4] *Vanzant* v. *Waddel*, 2 Yerger's Tennessee Reports, page 270; decided 1829. *Wally's Heirs* v. *Kennedy*, 2 Yerger's Tennessee Reports, page 555; decided 1831. *State Bank* v. *Cooper*, 2 Yerger's Tennessee Reports, page 606; decided 1831.

munities, but clearly authorizes such laws, provided they extend the privileges granted, not to every member of the community, or to every one in the same circumstances, but to any "who may be able to bring himself within the provisions of such law." The presence of this section in the Constitution of 1834 certainly had its effect upon the holding of the Supreme Court in the important case of *Budd* vs. *The State*, decided in 1842 but construing an Act passed in 1832, in which the Court used the following strong and explicit language: "It matters not how few the persons are, if all who are, or may come into the like circumstances and situations, be embraced, the law is general and not a partial law."[5]

The rule as recently declared by the Supreme Court, is, that a statute is the law of the land, provided it "embraces all persons who are or may come into like situation and circumstances," which is in effect the holding in the Budd case.[6]

In a case decided in 1879 the Court said of section 8 of Art. XI, "It does not prohibit legislation for the benefit of classes *composed of any members of the community who may bring themselves within the class.*"[7]

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[5]*Budd* v. *State*, 3 Humphrey's Tennessee Reports, page 492; decided 1842.

[6]*Stratton* v. *Morris*, 89 Tennessee Reports, page 497; decided 1890.

[7]*Davis* v. *State*, 3 Lea's Tennessee Reports, page 380. See also *Demoville* v. *Davidson County*, 87 Tennessee Reports, page 217.

If the rule had been, originally, that statutes must be equally binding upon every member of the community, the present holding would amount to a reversal, but when the cases are understood, it is clear that it is only an evolution, and one which is related directly to the deficiencies of our plan of local government, as developed by the increase of population, the multiplication of occupations, the diversification of local interests and needs, and the consequent necessity for special, local legislation. We must have local and special legislation, and, except in municipal corporations there is no way to get it save from the Legislature.

The Supreme Court has come to the help of the people and has provided a remedy, which, if imperfect and liable to abuse, is probably, the best that could be devised, for the gross deficiency of the Constitution in the matter of local legislation. The powers thus conceded to the Legislature have been exercised beneficently in many instances, but they are now being asserted to an unreasonable extent.

It was not until after 1870 that the subject became one of great practical importance. Very soon after the adoption of the Constitution of that year, the question arose whether or not the powers of a municipal corporation could be increased or diminished by special laws, the last sentence of section 8 of Art. XI providing that corporations shall not be created or their powers changed except by general laws, and the deci-

sion was in the affirmative, despite evidence in the journal of the Convention of 1870 that that body intended otherwise, and despite the unqualified language of the Constitution.[8]

The decision still holds, and the General Assembly can legislate specially as to municipal corporations, as political bodies, though not as to private corporations or as to municipal corporations in their proprietary or business affairs, except as may appear hereafter. In view of the system of government contemplated by the Constitution, the reasoning of the Supreme Court upon this subject is conclusive, and that tribunal is not responsible for the constant intermeddling of the General Assembly in the affairs of municipal corporations, sometimes beneficially but often injuriously.

In 1877 an Act was passed, forbidding the sale of intoxicating liquors, at retail, within four miles of incorporated institutions of learning, except in an incorporated town,[9] and the Supreme Court held the law valid, despite the exception of municipal corporations. Amendments of the Act of 1877 have made it unlawful to sell intoxicants, at retail within four miles of any school house, public or private, in term time or in vacation, except in incorporated towns of a specified population.

In 1879, a case arose, which, by its particular facts

[8]*Luehrman* v. *Taxing District*, 2 Lea's Tennessee Reports, pages 431-433.

[9]Acts of Tennessee, 1877, chapter 23.

elicited a holding which was a logical result of the Budd case, but which went further, probably, than the lawyers or the courts, before that time, had regarded as possible.

An Act of Assembly had been passed to repeal the charters of certain municipal corporations and to remand the territory and inhabitants thereof to the government of the State. In form, this was a general law; in fact, it was intended to apply only to the city of Memphis. Judge Freeman of the Supreme Court said of it, in a dissenting opinion, "it was born of an emergency, to meet the pressure of a particular case," and such beyond question was the fact.[10]

The effect of this decision is that by an Act general in form, but so constructed as to be applicable to all who may bring themselves within the conditions prescribed by it, the General Assembly, may legislate, constitutionally, to "meet the pressure of a particular case," or the needs of a particular locality.

The case of *Cook* vs. *The State,* 90th Tennessee, 407, involved the constitutionality of a statute, known as the "Dortch Law," regulating elections but applying, when passed, only to counties of 70,000 and cities of 9,000 inhabitants. The Act was passed in 1890 when only Shelby and Davidson Counties had the designated population. Nevertheless, it was declared to be constitutional, the court saying: "all counties

[10] *Luehrman* v. *Taxing District,* 2 Lea's Tennessee Reports, pages 510-511.

and cities that have or may hereafter have the designated population are embraced." [11]

Thus was upheld Legislation applicable, to only two counties, and dealing with the suffrage, which is not one of the matters usually regulated with reference to local conditions.

In 1901, an Act was passed which was known as the "Knox County road law," and the Supreme Court held it constitutional, although while general in form, it applied, when passed, to only one county, and there were two counties in the State which had more than the maximum population prescribed by it.[12]

The decision in this case was declared by the Supreme Court to be a logical consequence, of the Cook case.

Legislation upon the subject of fences, of purely local application, likewise has been upheld. Chapter 23 of the Acts of 1899 was: "An Act to prevent stock from running at large in counties of this State having a population of 59,000 or more, according to the federal census of 1890, or according to any subsequent federal census." This Act was held constitutional mainly upon the authority of the Cook case referred to above.[13]

Thus, as the law now stands, a statute is constitutional, no matter how limited the territory or the number of persons to whom it may actually apply,

[11] *Cook* v. *State*. 90 Tennessee Reports, page 413.
[12] *Condon* v. *Maloney*. 108 Tennessee Reports, page 82.
[13] *Peterson* v. *State*, 104 Tennessee Reports, page 127.

provided it "may be extended to any member of the community who may be able to bring himself within its provisions."[14]

This carries the logic of the earlier cases, and, it may be, of the Constitution, to its ultimate conclusion, and may be taken as vesting in the General Assembly, practically, an unlimited, but indirect, power of local legislation, provided the classifications be not palpably arbitrary or capricious, and but for the aid thus given by the Supreme Court, the State would be intolerably hampered by the present Constitution. In many instances the General Assembly has enacted local laws in response to well founded appeals for relief which could not be had otherwise, and the Supreme Court, properly, has supported such legislation, when possible, by liberal constructions of the Constitution, although it has been compelled to set aside many statutes. Inevitably the policy has been progressive, and the Legislature gradually extending its claims has gone, it is believed, farther, in many instances, than the decisions warrant, or than the Supreme Court would now permit if the Acts should be attacked.

Class legislation cannot supply entirely the want of a system of local government, and there is constant danger of extending it to subjects that, of right, should be regulated exclusively by general laws.

The General Assembly, ordinarily, is not qualified

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[14] *Cole Manufacturing Company* v. *Falls*, 90 Tennessee Reports, page 482.

to legislate upon local matters. It is declared by reason, as well as by experience, that it is both expedient and right, that the people directly interested should be allowed to determine for themselves many things that are now decided for them by the Legislature, which acts upon them, usually, without adequate information, and with indifference. The policy which now prevails can be justified only in exceptional cases. It has come to be understood that local acts, of all kinds, introduced in the General Assembly, will pass as a matter of course, as a mark of proper courtesy to the members presenting them. This is not true invariably, but very generally. The result is that local legislation, as a rule, is controlled entirely by the member or members representing the locality to be affected, and the method must be condemned, because statutes thus enacted do not express the intelligent purpose of any considerable part of the Assembly, any more than they represent the will of the people on whom they are imposed.

The people of the State ought not to submit longer to this autocracy of the sitting member in local legislation. They should amend the Constitution so as to provide for genuine local self-government.

It required three thousand printed pages to contain all the laws, general and local, passed by the Legislatures of 1901 and 1903, the last named body having produced over 1,600 pages of statutes and resolutions. As there are less than seventy-five legislative days in

each session, this means an average of more than twenty printed pages of new law each day. The conclusion that much of this great mass of legislation does not represent the intelligent and deliberate judgment of the General Assembly, is irresistible. Such unparalleled productiveness would be impossible if each Act received careful attention. It is clear that much of this is committee legislation, exclusively, and more of it, courtesy legislation upon local matters.

The printed Acts of 1901 are 487 in number, covering 1269 large pages, and of these less than 200 are general laws, while the others apply entirely to local matters. Doubtless, many of the local Acts are constitutional, but how far they are necessary, expedient or wise is a different question.

Much of the special legislation of 1901 and 1903, consisted of charters granted to municipal corporations, and this was caused largely by amendments of the liquor law. Chapter 221 of the Acts of 1899 extended the prohibition of the four mile law to towns of not more than 2,000 inhabitants, incorporated after the passage of the Act. In 1901, the town of McMinnville, having a population of less than 2,000, and being already incorporated, availed itself of the provisions of a statute authorizing municipal corporations to surrender their charters and to adopt new ones. The legality of this action was disputed by a retail liquor dealer doing business in the town, but the Supreme Court re-affirmed the constitutionality of

the Act of 1877 and its amendments, and held that by its re-incorporation, McMinnville became a new corporation and therefore entitled to the benefits of the Act of 1899.[15]

As a consequence of this decision, other towns followed the example of McMinnville, and the number of these was increased by chapter 2 of the Acts, of 1903, amending the Act of 1899 by extending it to towns of less than 5,000 inhabitants. These are good "roundabout" laws, but the towns ought to have been able to get their new charters without special legislative action.

Recent Legislatures have made an astonishing number of changes of County lines, created "no fence" laws, and live stock laws, to suit the demands of particular localities, authorized a multitude of bond issues by towns and counties, regulated hunting in certain counties, prohibited the destruction of fish in districts arbitrarily created, and, in almost every conceivable way, have dealt with the minutiae of local government, and all this, necessarily, without system, usually without investigation or adequate knowledge, acting upon the assurances of the proponents of the measures. The motives of the legislators usually are not wrong, and the results of this "courtesy" legislation frequently are good, but it is submitted that no law making body is justified in exercising its high

[15] *Brinkley* v. *State*, 108 Tennessee Reports, page 475.

functions except upon full knowledge, after careful investigation. No doubt committees act upon all these special laws, but a glance at the plethoric biennial statute books will demonstrate the impossibility of more than the most superficial examination even by the committees.

The transference to district or township bodies of many of the powers now exercised by the General Assembly, is the only possible method of securing efficient and satisfactory local government, and in this there would be nothing hazardous, because the laws and institutions of many well governed and prosperous States afford ample and safe guidance.

Section 9 of Art. XI of the Constitution, provides that the Legislature may vest such powers in the Courts of justice with regard to private and local affairs, as may be deemed expedient. This section was in the Constitution of 1834, also, as a compromise on the subject of local government, but it has had no perceptible effect, unless it be in the enlargement of the administrative powers of the County Court, in certain respects. The policy of this compromise is reactionary, and wrong, for while an increase of administrative agencies is needed, the grave matters of justice should be the sole concern of the Courts, and speaking generally, it would appear to be fundamentally wrong to invest any tribunal, with both judicial and administrative powers. In authorizing such a combination of powers we revert to the colonial polity,

or, in a measure, adopt the plan applied by the Federal government to its Territories.

The self governing powers of the municipal corporations of Tennessee should be increased, and the Legislature should be allowed to deal with them only by general laws.

There exists a strong and well founded sentiment in favor of permitting incorporated towns to exempt manufacturing establishments from taxation for a limited period, but this is impossible under the present Constitution.

Strong reasons, and precedents might be presented for allowing municipalities to make their own charters, under general laws, and in any event the duties and the responsibilities of administration and of purely local legislation should be placed upon them. As it is, the General Assembly, extends or contracts their boundaries at will, creates and abolishes offices, changes the salaries of officers, authorizes bond issues, with or without a vote of the people, fixes the rate of taxation, and in short, if it so elect, manages their affairs from the largest to the least. This is undemocratic, a denial of the right of local self-government, and, not infrequently a source of serious detriment to the municipalities.

While the Constitution provides for common schools it is silent on the subject of higher education, except that it ratifies existing laws in favor of Colleges and Universities. The good name and the prosperity

of the State require constitutional provision for a State University. If divisional sentiment, or any other cause, prevents the support of the State University, now located at Knoxville, such an institution should be established elsewhere. Inattention to higher education, by the State government is a reproach to Tennessee, and should be made impossible hereafter by proper constitutional provisions. The Legislatures of 1903 and 1905 made small appropriations to the University, and there is reason to hope that hereafter the State will do its duty in that respect. The University is now an admirable institution, and should be encouraged in its effort to become the efficient head of our school system, to respond to the educational needs of the time, and to become the center of the educational and intellectual life of the State. It should be governed by a board of Regents or Trustees, elected by all the people of the State.

The gubernatorial succession should be regulated by creating the office of Lieutenant Governor, or, at least, by so amending the clause of the Constitution which deals with that subject, as to relieve it of ambiguity. The opinion of the Attorney General, for the State, delivered in the Spring of 1905, upon the occasion of the resignation of the Governor, holding that the speaker of the Senate becomes, in such cases, the Governor, and not merely an acting Governor, is sound, but it is intolerable that any uncertainty should exist as to a matter so important.

The Supreme Court has construed section 17 of Article XI of the Constitution, as authorizing a statute empowering the Governor to appoint county commissioners of registration and election, and has thus disposed of a very serious question, arising out of the language and history of that section, which provides that: "No county office created by the Legislature shall be filled otherwise than by the people or the County Court." The history of the adoption of this section is interesting and instructive. Upon the authority of members of the Convention, it is stated[16] that this section was adopted just before the final adjournment, after the Constitution had been engrossed and was awaiting the signatures of the members. Upon the same authority it is stated that it was designed to prevent the appointment of county officers of election by the Governor. It seems that, at the time indicated, the members of the Convention remaining in Nashville, were assembled, informally, in the Convention hall, when W. V. Thompson of Maury County exclaimed, suddenly, that they had failed to do the very thing they had been sent there to do, to-wit, to prevent the appointment of county election officers by the Governor. After some discussion Judge Nicholson wrote section 17 of Article XI, as it now stands, and the Convention having been called to order by President Brown, adopted it by unanimous consent. It is evident that it is misplaced,

[16]Judge Henry R. Gibson and Hon. P. G. Fulkerson.

and an examination of the official copy of the Constitution now on file in the office of the Secretary of State, will show that it is an interlineation. It is well known that one of the principal purposes for which the Convention of 1870 was called was to prevent the recurrence of conditions that had arisen under the reconstruction government, among the most objectionable of which was the control of elections by the executive, through the county officers of election. This question was decided in the case of *Cook* v. *State*, 90th Tennessee 407, and the writer is one of those who, recognizing the great ability and the high character of the Supreme Court, have nevertheless, been unable to accept its ruling in this case.

There is room for respectful dissent from the holding that our election laws do not impose an educational qualification upon voting, in denying to illiterate voters the right of assistance in marking their printed ballots. This question also was decided in the case of Cook against the State, 90th Tenn. 407, referred to above. The court said, in its opinion, as to illiterate voters: "The names of candidates are printed, and with little effort the unlettered voter can soon become as well acquainted with the printed name of his candidate as with his face, and, with easy readiness, place his cross opposite that name, and fold his ticket as required." [17]

This reasoning, if to a certain extent sound can-

[17] *Cook* v. *State*, 90 Tennessee Reports, page 412.

not be accepted as to long ballots, containing sometimes as many as thirty or forty names, and the fact is indisputable that the effect of the law has been the disfranchisement of illiterate voters, when unaided by unlawful devices. However sound the logic of the opinion may be, it is not consonant with the actual results, and the matter is one of so much importance that the frankest treatment of it is required.

The race question, from which there is no escape, should be dealt with frankly and directly. Without reference to the abstract aspect of the subject, the actual condition developed, beyond dispute, by forty years of experience, is that the Southern people are fixed, immovably in the determination that the white race shall control. It has been demonstrated, not less clearly, that the great majority of the negroes are not yet fit to be trusted with the ballot. The repeal of the fifteenth amendment of the Federal Constitution, however desirable, is in the highest degree improbable. It rests with the people of the States, therefore, to make effectual, by open and direct measures, their purpose of securing white supremacy and regulating the right of negroes to vote.

Whatever the future of the race may be, there can be no doubt that by attaching to the right of suffrage such constitutional qualifications as will permit only intelligent and worthy negroes to vote, the southern States will render a great service alike to the negroes and to the country. Mississippi, Virginia, and other

States have adopted such constitutional provisions with the most beneficial results.

The removal of temptation to deal improperly with an illiterate and corruptible element of the electorate cannot fail to be of benefit to the public.

That the time may come when all the negroes, and all the white men of our country will be worthy of the suffrage, is the sincere desire of all patriotic citizens, and any constitutional provision that may be adopted, should be so framed as not to exclude any negro who is now qualified, or who may hereafter be qualified to vote intelligently and independently.

The maintenance of separate courts of law and equity, is not in keeping with the best legal opinion of the time, and is the more undesirable in this State, since the Act of 1877, which gave the Chancery Courts jurisdiction of nearly all the subjects, which theretofore had belonged exclusively to the courts of law.

In the year 1899 there were thirty-nine Judges of inferior courts in Tennessee, and the General Assembly which met in that year, proceeded under Section 6, of Article VI, of the constitution to remove a number of them, upon the ground of economy. At the same time the circuits and chancery divisions presided over by the judges thus sought to be removed, were abolished, and the counties composing them attached to others. The litigation which naturally ensued, resulted in the declaration by the Supreme Court, that the removal contemplated by Article VI, section 6,

was for cause affecting the official personally, or the administration of his office, and that no such cause was shown to exist, in the cases then before it, but that the Legislature might abolish circuits and chancery divisions and transfer the counties composing them, and thus deprive the incumbent Judges or Chancellors of official powers and character, and of the right to draw a salary from the State.[18]

Both conclusions appear to have been unavoidable, the first upon obvious grounds of reason and justice, the second upon the much more debatable ground of precedent. Results have not approved the policy of the Legislature of 1899. The first consequence was a widespread disturbance of the judicial establishment, followed by bitter and vexatious litigation to which the State and the ousted Judges were the parties. The second was an unseemly struggle, in certain instances, to determine upon which Judge the blow should fall, and the third a continuing condition of apprehension among the Circuit Judges and Chancellors that some of them may still be found superfluous, or that new occasions for economy may arise.

The power to abolish a circuit or a chancery division, thus enables the General Assembly to abolish judgeships at will and at any time, by indirect action. The Constitution should, at the least, limit the power of the Legislature to abolish circuits and chancery divisions, to the periods when the regular judicial term

[18] *Judges Salary Cases*, 102 Tennessee Reports, page 509.

of eight years expires. This would not interfere with the constitutional and indispensable right to create additional circuits or divisions, at any time.

In conclusion it is submitted that under its present Constitution Tennessee cannot be well governed.

The Acts of 1905 furnish some striking illustrations of the extent to which in response to imperious demands for special relief, the Legislature is carrying the policy of class legislation. Chapter 33 defines a lawful fence in counties of not less than 22,738 and not more than 22,750, population. Chapter 48 authorizes the issuance of bonds by municipal corporations having a population of not less than 2,179 and not more than 2,200. Chapter 60 is to prevent live stock from running at large in counties having a population of not less than 10,700 and not more than 11,000. Chapter 461 creates a Board of Jury Commissioners in counties having a population of not less than 26,424 and not more than 26,430.

Less excusable perhaps than any of these is chapter 274 which authorizes the Governor to appoint additional Notaries Public in counties of not less than 12,936 and not more than 12,975, population. The classification is not more capricious here than in the other Acts, but the result will be, if the Act stand, that the important office of Notary Public will be filled, in part, in one county by appointment of the Governor, and in all others by election by the County Court. It is inconceivable that there should be any valid

reason for the distinction, and there can be nothing but the most unqualified condemnation of the policy. Of like quality are chapter 297 which suspends, in part, for a period of several months, the tax laws of the State in counties having a population of not less than 35.000 and not more than 36,250, and chapter 352 which forbids the sale of intoxicants in counties having a population of not less than 29,250 and not more than 29,300.

These are a few of the many special and local acts, and an examination of the published laws of 1905, is suggested to all who dispute, or doubt, the necessity for a new Constitution in Tennessee.

Thus it is demonstrated that the effort to prevent special legislation as to local matters by the General Assembly, must be futile so long as the present Constitution stands. The only reasonable and proper plan is to authorize local legislation and local administration by local bodies, under proper limitations prescribed by general laws, or if that cannot be done, then the Legislature should be allowed to pass local laws, directly, without resorting to classification or evasion.

This exclusively centralized system of legislation is inherently illogical and undemocratic, and, in its practical operation, positively injurious. To every man who will study the subject fairly, it will become apparent that the need of Tennessee for a new Constitution, providing first, among other things, for genuine

local self government is imperative. Upon the subject of taxation, there is much dissatisfaction in the State, but this is normal and inevitable, and the history of the last ten years proves that the faults of the Constitution, in this respect, which were strongly condemned in the first edition of this book, may be corrected in a large measure by careful legislation.

James Phelan, the historian of Tennessee declares that: "In Tennessee we have within the limits of a century, a picture of national life, as complete as that of England through its two thousand years, or that of Rome, from the Kings to the Emperors."

If it be admitted that this is an extreme statement, it is certainly true that the history of Tennessee exhibits an unbroken process of natural and orderly, social and political evolution. There is probably no State in the Union whose population is more homogeneous; none whose social and political institutions can be more directly, or certainly, traced to English originals, or whose development has proceeded more consistently along the lines of the purest Anglo-Saxon principles. That we have been too conservative, that we are standing in our own light, that on account of groundless apprehensions of imagined evils, and distrust of our leaders and of ourselves, we still cling to a Constitution which we have outgrown, and which retards our progress, will be clear to any who will study the subject with an open mind. Conditions de-

mand, and, ere long, will compel, a revision of the Constitution. We need not break with the past, it will be enough to do what our fathers did in 1834, when they modified the Constitution so as to adapt it to the needs of that time, "touching it, with a cautious and circumspect hand."

Appendix.

The Constitution of the State of Tennessee as revised by the Convention of delegates, assembled in Nashville, January 10, 1870, with notes of the more important changes from the Constitution of 1834. Except as herein noted the Constitution remains, substantially, as adopted in 1834.

ARTICLE I.

DECLARATION OF RIGHTS.

Section 1. That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; for the advancement of those ends they have, at all times, an unalienable and indefeasible right to alter, reform, or abolish the government in such manner as they may think proper.

Section 2. That government being instituted for the common benefit, the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind.

Section 3. That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man

can of right, be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship.

Section 4. That no political or religious test, other than an oath to support the Constitution of the United States and of this State, shall ever be required as a qualification to any office or public trust under this State.

The inhibition of a political test and the requirement of an oath to support the Constitution of the United States and of Tennessee, were not in the Constitution of 1834.

Section 5. That elections shall be free and equal, and the right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto, except upon a conviction by a jury of some infamous crime, previously ascertained and declared by law, and judgment thereon by a court of competent jurisdiction.

Constitution 1834, simply declared: "That elections shall be free and equal."

Section 6. That the right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors.

Constitution 1834, declared: "That the right of trial by jury shall remain inviolate."

Section 7. That the people shall be secure in their persons, houses, papers and possessions, from un-

reasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offenses are not particularly described and supported by evidence, are dangerous to liberty, and ought not to be granted.

Section 8. That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land.

Constitution 1834, extended the immunity only to "free" men.

Section 9. That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face; to have compulsory process for obtaining witnesses in his favor; and in prosecutions by indictment or presentment, a speedy public trial by an impartial jury of the county in which the crime shall have been committed, and shall not be compelled to give evidence against himself.

Constitution 1834, in prescribing the place of trial used the words "county or district."

Section 10. That no person shall, for the same offense, be twice put in jeopardy of life or limb.

Section 11. That laws made for the punishment of acts committed previous to the existence of such laws, and by them only declared criminal, are contrary to the principles of a free government; wherefore no *ex post facto* law shall be made.

Section 12. That no conviction shall work corruption of blood or forfeiture of estate. The estate of such persons as shall destroy their own lives, shall descend or vest, as in case of natural death. If any person be killed by casualty, there shall be no forfeiture in consequence thereof.

Section 13. That no person arrested and confined in jail shall be treated with unnecessary rigor.

Section 14. That no person shall be put to answer any criminal charge but by presentment, indictment or impeachment.

Section 15. That all prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident or the presumption great. And the privileges of the writ of *Habeas Corpus* shall not be suspended, unless when, in case of rebellion or invasion, the General Assembly shall declare the public safety requires it.

Constitution 1834, did not contain the words: "The General Assembly shall declare."

Section 16. That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 17. That all courts shall be open; and every man, for an injury done him in his lands, goods,

person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay. Suits may be brought against the State in such manner and in such courts as the Legislature may, by law, direct.

Section 18. The Legislature shall pass no law authorizing imprisonment for debt in civil cases.

Constitution 1834, authorized imprisonment for debt, but not to be continued after the debtor had delivered all his property for the benefit of creditors.

Section 19. That the printing presses shall be free to every person to examine the proceedings of the Legislature, or of any branch or officer of the Government; and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. But in prosecutions for the publication of papers investigating the official conduct of officers or men in public capacity, the truth thereof may be given in evidence; and in all indictments for libel the jury shall have a right to determine the law and the facts, under the direction of the court, as in other criminal cases.

Section 20. That no retrospective law, or law impairing the obligations of contracts, shall be made.

Section 21. That no man's particular services shall be demanded, or property taken or applied to public

use, without the consent of his representatives, or without just compensation being made therefor.

Section 22. That perpetuities and monopolies are contrary to the genius of a free State, and shall not be allowed.

Section 23. That the citizens have a right, in a peaceable manner, to assemble together for their common good, to instruct their representatives, and to apply to those invested with the powers of government for redress of grievances, or other proper purposes, by address or remonstrance.

Section 24. That the sure and certain defense of a free people is a well regulated militia; and, as standing armies in time of peace are dangerous to freedom, they ought to be avoided as far as the circumstances and safety of the community will admit; and that in all cases the military shall be kept in strict subordination to the civil authority.

Section 25. That no citizen of this State, except such as are employed in the army of the United States, or militia in actual service, shall be subjected to punishment under the martial or military law. That martial law, in the sense of the unrestricted power of military officers or others, to dispose of the persons, liberties or property of the citizen, is inconsistent with the principles of free government, and is not confided to any department of the government of this State.

Constitution 1834, did not contain the second sentence or the last three words of the first, but did contain the word "corporal" before the word punishment in the first sentence.

Section 26. That the citizens of this State have a right to keep and to bear arms for their common defense. But the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime.

Constitution 1834, allowed "free white men" to bear arms for their common defense, and made no provision for regulating the right.

Section 27. That no soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in a manner prescribed by law.

Section 28. That no citizen of this State shall be compelled to bear arms, provided he will pay an equivalent, to be ascertained by law.

Section 29. That an equal participation in the free navigation of the Mississippi is one of the inherent rights of the citizens of this State; it cannot, therefore, be conceded to any prince, potentate, power, person or persons, whatever.

Section 30. That no hereditary emoluments, privileges or honors, shall be granted or conferred in this State.

Section 31. That the limits and boundaries of this State be ascertained, it is declared they are as hereafter mentioned, that is to say: Beginning on the extreme height of the Stone Mountain, at the place where the line of Virginia intersects it, in latitude thirty-six degrees and thirty minutes North; running thence along the extreme height of the said mountain

to the place where Watauga River breaks through it; thence a direct course to the top of the Yellow Mountain, where Bright's road crosses the same; thence along the ridge of said mountain, between the waters of Doe River and the waters of Rock Creek, to the place where the road crosses the Iron Mountain; from thence, along the extreme height of said mountain, to the place where Nollichucky River runs through the same; thence to the top of the Bald Mountain; thence along the extreme height of said mountain to the Painted Rock, on French Broad River; thence along the highest ridge of said mountain to the place where it is called the Great Iron or Smoky Mountain; thence along the extreme height of said mountain to the place where it is called Unicoi or Unaka Mountain, between the Indian towns of Cowee and Old Chota; thence along the main ridge of the said mountain to the Southern boundary of this State, as described in the act of cession of North Carolina to the United States of America; and that all the territory, lands and waters, lying west of the said line, as before mentioned, and contained within the chartered limits of the state of North Carolina, are within the boundaries and limits of this State, over which the people have the right of exercising sovereignty, and the right of soil, so far as is consistent with the Constitution of the United States, recognizing the Articles of confederation, the Bill of Rights, and Constitution of North Carolina, the cession act of the said State, and

the ordinance of Congress for the government of the territory Northwest of the Ohio; Provided, nothing herein contained shall extend to affect the claim or claims of individuals to any part of the soil which is recognized to them by the aforesaid cession act: And provided, also, that the limits and jurisdiction of this State shall extend to any other land and territory now acquired, or that may hereafter be acquired, by compact or agreement with other States or otherwise, although such land and territory are not included within the boundaries hereinbefore designated.

Section 32. That the erection of safe and comfortable prisons, the inspection of prisons, and the humane treatment of prisoners, shall be provided for

Not in Constitution 1834.

Section 33. That slavery and involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, are forever prohibited in this State.

This is the first amendment of 1865.

Section 34. The General Assembly shall make no law recognizing the right of property in man.

This is the second amendment of 1865.

ARTICLE II.

DISTRIBUTION OF POWERS.

Section 1. The powers of the Government shall be divided into three distinct departments: the Legislative, Executive, and Judicial.

Section 2. No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted.

LEGISLATIVE DEPARTMENT.

Section 3. The Legislative authority of this State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives, both dependent on the people: who shall hold their offices for two years from the day of the general election.

This clause in Constitution 1834 did not prescribe the term of office.

Section 4. An enumeration of the qualified voters, and an apportionment of the representatives in the General Assembly, shall be made in the year one thousand eight hundred and seventy-one, and within every subsequent term of ten years.

Section 5. The number of Representatives shall, at the several periods of making the enumeration, be apportioned among the several counties or districts, according to the number of qualified voters in each; and shall not exceed seventy-five, until the population of the State shall be one million and a half, and shall never exceed ninety-nine; Provided, that any county having two-thirds of the ratio shall be entitled to one member.

Section 6. The number of Senators shall, at the several periods of making the enumeration, be ap-

portioned among the several counties or districts, according to the number of qualified electors in each, and shall not exceed one-third the number of representatives. In apportioning the Senators among the different counties, the fraction that may be lost by any county or counties, in the apportionment of members to the House of Representatives, shall be made up to such county or counties in the Senate, as near as may be practicable. When a district is composed of two or more counties, they shall be adjoining; and no county shall be divided in forming a district.

Section 7. The first election for Senators and Representatives shall be held on the second Tuesday in November, one thousand eight hundred and seventy; and forever thereafter, elections for members of the General Assembly shall be held once in two years, on the first Tuesday after the first Monday in November. Said elections shall terminate the same day.

Section 8. The first session of the General Assembly shall commence on the first Monday in October, one thousand eight hundred and seventy-one, at which time the term of service of the members shall commence, and expire on the first Tuesday of November, one thousand eight hundred and seventy-two; at which session the Governor elected on the second Tuesday in November, one thousand eight hundred and seventy, shall be inaugurated; and, forever thereafter, the General Assembly shall meet on the first Monday in

January, next ensuing the election, at which session thereof the Governor shall be inaugurated.

Under Constitution 1834 the Legislature met in October.

Section 9. No person shall be a Representative unless he shall be a citizen of the United States, of the age of twenty-one years, and shall have been a citizen of this State for three years, and a resident in the county he represents one year, immediately preceding the election.

Section 10. No person shall be a Senator unless he shall be a citizen of the United States, of the age of thirty years, and shall have resided three years in this State, and one year in the county or district, immediately preceding the election. No Senator or Representative shall, during the time for which he was elected, be eligible to any office or place of trust, the appointment to which is vested in the Executive or General Assembly, except to the office of trustee of a literary institution.

Section 11. The Senate and House of Representatives, when assembled, shall each choose a Speaker and its other officers; be judges of the qualifications and elections of its members, and sit upon its own adjournments from day to day. Not less than two-thirds of all the members to which each house shall be entitled shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized, by law, to compel the attendance of absent members.

Constitution 1834, made "two-thirds of each house" a quorum.

Section 12. Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member, but not a second time for the same offense; and shall have all other powers necessary for a branch of the Legislature of a free State.

Section 13. Senators and Representatives shall, in all cases, except treason, felony, or breach of the peace, be privileged from arrest during the session of the General Assembly, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.

Section 14. Each house may punish by imprisonment, during its session, any person not a member, who shall be guilty of disrespect to the house, by any disorderly or any contemptuous behavior in its presence.

Section 15. When vacancies happen in either house, the Governor for the time being, shall issue writs of election to fill such vacancies.

Section 16. Neither house shall, during its session, adjourn without the consent of the other, for more than three days, nor to any other place than that in which the two houses shall be sitting.

Section 17. Bills may originate in either house; but may be amended, altered or rejected by the other. No bill shall become a law which embraces more than one subject, that subject to be expressed in the title. All acts which repeal, revive or amend former laws,

shall recite in their caption, or otherwise, the title or substance of the law repealed, revived or amended.

The second and third sentences were not in Constitution 1834.

Section 18. Every bill shall be read once, on three different days, and be passed each time in the house where it originated, before transmission to the other. No bill shall become a law until it shall have been read and passed, on three different days in each house, and shall have received, on its final passage, in each house, the assent of a majority of all the members to which that house shall be entitled under this Constitution; and shall have been signed by the respective Speakers in open session, the fact of such signing to be noted on the journal; and shall have received the approval of the Governor, or shall have been otherwise passed under the provisions of this Constitution.

Section 19. After a bill has been rejected, no bill containing the same substance shall be passed into a law during the same session.

Section 20. The style of the laws of this State shall be, "Be it enacted by the General Assembly of the State of Tennessee" No law of a general nature shall take effect until forty days after its passage unless the same or the caption shall state that the public welfare requires that it should take effect sooner.

Section 21. Each house shall keep a journal of its proceedings, and publish it, except such parts as the welfare of the State may require to be kept secret: the ayes and noes shall be taken in each house upon

the final passage of every bill of a general character, and bills making appropriations of public moneys; and the ayes and noes of the members on any question, shall, at the request of any five of them, be entered on the journal.

Section 22. The doors of each house and of committees of the whole shall be kept open, unless when the business shall be such as ought to be kept secret.

Section 23. The sum of four dollars per day, and four dollars for every twenty-five miles traveling to and from the seat of government, shall be allowed to the members of each General Assembly elected after the ratification of this constitution, as a compensation for their services. But no member shall be paid for more than seventy-five days of a regular session, or for more than twenty days of any extra or called session, or for any day when absent from his seat in the Legislature, unless physically unable to attend. The Senators, when sitting as a court of impeachment, shall each receive four dollars per day of actual attendance.

Section 24. No money shall be drawn from the treasury but in consequence of appropriations made by law; and an accurate statement of the receipts and expenditures of the public money shall be attached to and published with the laws at the rise of each stated session of the General Assembly.

Section 25. No person who heretofore hath been, or may hereafter be, a collector or holder of public

moneys, shall have a seat in either house of the General Assembly, or hold any other office under the State Government, until such person shall have accounted for, and paid into the treasury, all sums for which he may be accountable or liable.

The words: "or hold any other office under the State Government" were not in Constitution 1834.

Section 26. No judge of any court of law or equity, Secretary of State, Attorney General, Register, Clerk of any court of record, or person holding any office under the authority of the United States, shall have a seat in the General Assembly; nor shall any person in this State hold more than one lucrative office at the same time; Provided, That no appointment in the militia, or to the office of Justice of the Peace, shall be considered a lucrative office, or operative as a disqualification to a seat in either house of the General Assembly.

Section 27. Any member of either house of the General Assembly shall have liberty to dissent from and protest against, any act or resolve which he may think injurious to the public or to any individual, and to have the reasons for his dissent entered on the journals.

Section 28. All property, real, personal or mixed, shall be taxed, but the Legislature may except such as may be held by the State, by counties, cities or towns, and used exclusively for public or corporation purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary

or educational, and shall except one thousand dollars worth of personal property in the hands of each taxpayer, and the direct product of the soil in the hands of the producer, and his immediate vendee. All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State. No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of the same value, but the legislature shall have power to tax merchants, peddlers and privileges, in such manner as they may from time to time direct.

The portion of a merchant's capital used in the purchase of merchandise sold by him to nonresidents and sent beyond the State, shall not be taxed at a rate higher than the ad valorem tax on property.

The Legislature shall have the power to levy a tax upon incomes derived from stocks and bonds that are not taxed ad valorem.

All male citizens of this State over the age of twenty-one years, except such persons as may be exempted by law on account of age or other infirmity shall be liable to a poll tax of not less than fifty cents nor more than one dollar per annum. Nor shall any county or corporation levy a poll tax exceeding the amount levied by the State.

The corresponding clause in Constitution 1834, was as follows: "All lands liable to taxation, held by deed, grant or entry, town lots, bank stock, slaves between the ages

of twelve and fifty years, and such other property as the Legislature may from time to time deem expedient, shall be taxable. All property shall be taxed according to its value; that value to be ascertained in such manner as the Legislature shall direct so that the same shall be equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value, but the Legislature shall have power to tax merchants, peddlers and privileges in such manner as they may from time to time direct. A tax on white polls shall be laid in such manner, and of such an amount as may be prescribed by law." The authority to tax incomes is new.

Section 29. The General Assembly shall have power to authorize the several counties and incorporated towns in this State, to impose taxes for county and corporation purposes respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to State taxation. But the credit of no county, city or town shall be given or loaned to or in aid of any person, company, association or corporation, except upon an election to be first held by the qualified voters of such county, city or town, and the assent of three-fourths of the votes cast at said election. Nor shall any county, city or town become a stockholder with others in any company, association or corporation, except upon a like election and the assent of a like majority. But the counties of Grainger, Hawkins, Hancock, Union, Campbell, Scott, Morgan, Grundy, Sumner, Smith, Fentress, Van Buren, and the new county herein authorized to be established out of fractions of Sumner, Macon and

Smith counties, White, Putnam, Overton, Jackson, Cumberland, Anderson, Henderson, Wayne, Cocke, Coffee, Macon, Marshall and Roane shall be excepted out of the provisions of this section so far that the assent of a majority of the qualified voters of either of said counties voting on the question shall be sufficient when the credit of such county is given or loaned to any person, association or corporation. Provided, that the exception of the counties above named shall not be in force beyond the year one thousand eight hundred and eighty, and after that period they shall be subject to the three-fourths majority applicable to the other counties of the State.

Constitution 1834, gave the Legislature power to authorize counties and incorporated towns to impose taxes in a manner to be prescribed by law, and required such taxation to be according to value, and "upon the principles established in regard to state taxation." The remainder of this section is new.

Section 30. No article manufactured of the produce of this State, shall be taxed otherwise than to pay inspection fees.

Section 31. The credit of this State shall not be hereafter loaned or given to or in aid of any person, association, company, corporation, or municipality, nor shall the State become the owner in whole or in part of any bank or a stockholder with others in any association, company, corporation, or municipality.

Not in Constitution 1834.

Section 32. No convention or General Assembly of this State shall act upon any amendment of the

Constitution of the United States proposed by Congress to the several States; unless such Convention or General Assembly shall have been elected after such amendment is submitted.

Not in Constitution 1834, and seems to be related directly to the approval of the 14th amendment of the Federal Constitution, by the Legislature.

Section 33. No bonds of the State shall be issued to any railroad company which, at the time of its application for the same, shall be in default in paying the interest upon the State bonds previously loaned to it, or that shall hereafter and before such application, sell or absolutely dispose of any State bonds loaned to it for less than par.

Not in Constitution 1834.

Article III.

EXECUTIVE DEPARTMENT.

Section 1. The Supreme Executive power of this State shall be vested in a Governor.

Section 2. The Governor shall be chosen by the electors of the members of the General Assembly, at the time and places where they shall respectively vote for the members thereof. The returns of every election for Governor shall be sealed up and transmitted to the seat of government, by the returning officers, directed to the Speaker of the Senate, who shall open and publish them in the presence of a majority of the members of each House of the General Assembly.

The person having the highest number of votes shall be Governor; but if two or more shall be equal and highest in votes, one of them shall be chosen Governor by joint vote of both Houses of the General Assembly. Contested elections for Governor shall be determined by both Houses of the General Assembly, in such manner as shall be prescribed by law.

Section 3. He shall be at least thirty years of age, shall be a citizen of the United States, and shall have been a citizen of this State seven years next before his election.

Section 4. The Governor shall hold his office for two years, and until his successor shall be elected and qualified. He shall not be eligible more than six years in any term of eight.

Section 5. He shall be Commander-in-Chief of the army and navy of this State, and of the Militia, except when they shall be called into the service of the United States: but the militia shall not be called into service except in case of rebellion or invasion, and then only when the General Assembly shall declare, by law, that the public safety requires it.

The corresponding section Constitution 1834 ended with the words: "United States."

Section 6. He shall have power to grant reprieves and pardons, after conviction, except in cases of impeachment.

Section 7. He shall, at stated times, receive a compensation for his services, which shall not be increased

or diminished during the period for which he shall have been elected.

Section 8. He may require information, in writing, from the officers in the executive department, upon any subject relating to the duties of their respective offices.

Section 9. He may, on extraordinary occasions, convene the General Assembly by proclamation, in which he shall state specifically the purposes for which they are to convene; but they shall enter on no legislative business except that for which they were specifically called together.

Constitution 1834 did not require the Governor to proclaim beforehand the purpose of the special session, but directed that it be stated to the Legislature "when assembled."

Section 10. He shall take care that the laws be faithfully executed.

Section 11. He shall, from time to time, give to the General Assembly information of the state of the Government, and recommend for their consideration such measures as he shall judge expedient.

Section 12. In case of the removal of the Governor from office, or of his death, or resignation, the powers and duties of the office shall devolve on the Speaker of the Senate; and in case of the death, removal from office, or resignation of the Speaker of the Senate, the powers and duties of the office shall devolve on the Speaker of the House of Representatives.

Section 13. No member of Congress, or person holding any office under the United States, or this State, shall execute the office of Governor.

Section 14. When any officer, the right of whose appointment is by this constitution vested in the General Assembly, shall, during the recess, die, or the office, by the expiration of the term, or by other means, become vacant, the Governor shall have power to fill such vacancy by granting a temporary commission, which shall expire at the end of the next session of the Legislature.

Section 15. There shall be a seal of this State, which shall be kept by the Governor, and used by him officially, and shall be called the GREAT SEAL OF THE STATE OF TENNESSEE.

Section 16. All grants and commissions shall be in the name and by the authority of the State of Tennessee, be sealed with the State seal, and signed by the Governor.

Section 17. A Secretary of State shall be appointed by joint vote of the General Assembly, and commissioned during the term of four years; he shall keep a fair register of all the official acts and proceedings of the Governor; and shall, when required, lay the same, and all papers, minutes and vouchers relative thereto, before the General Assembly; and shall perform such other duties as shall be enjoined by law.

Section 18. Every bill which may pass both Houses of the General Assembly, shall, before it becomes a

law, be presented to the Governor for his signature. If he approve, he shall sign it, and the same shall become a law; but if he refuse to sign it, he shall return it, with his objections thereto, in writing, to the House in which it originated; and said House shall cause said objections to be entered at large upon its journal, and proceed to reconsider the bill. If after such reconsideration a majority of all the members elected to that house shall agree to pass the bill, notwithstanding the objections of the Executive, it shall be sent, with said objections, to the other House, by which it shall likewise be reconsidered. If approved by a majority of the whole number elected to that House, it shall become a law. The votes of both houses shall be determined by yeas and nays, and the names of all the members voting for or against the bill shall be entered upon the journals of their respective Houses. If the Governor shall fail to return any bill, with his objections, within five days (Sundays excepted) after it shall have been presented to him, the same shall become a law without his signature, unless the General Assembly, by its adjournment, prevents its return, in which case it shall not become a law. Every joint resolution or order (except on questions of adjournment) shall likewise be presented to the Governor for his signature, and before it shall take effect shall receive his signature; and on being disapproved by him, shall, in like manner, be returned with his objections; and the same, before it shall take

effect, shall be repassed by a majority of all the members elected to both Houses, in the manner and according to the rules prescribed in case of a bill.

Not in Constitution 1834.

ARTICLE IV.

ELECTIONS.

Section 1. Every male person of the age of twenty-one years, being a citizen of the United States, and a resident of this State for twelve months, and of the county wherein he may offer his vote for six months, next preceding the day of election, shall be entitled to vote for members of the General Assembly, and other civil officers for the county or district in which he resides; and there shall be no qualification attached to the right of suffrage, except that each voter shall give to the judges of the election where he offers to vote, satisfactory evidence that he has paid the poll taxes assessed against him, for such preceding period as the Legislature shall prescribe, and at such time as may be prescribed by law; without which his vote cannot be received. And all male citizens of the State shall be subject to the payment of poll taxes and the performance of military duty, within such ages as may be prescribed by law. The General Assembly shall have power to enact laws requiring voters to vote in the election precincts in which they may reside,

and laws to secure the freedom of elections and the purity of the ballot-box.

Under Constitution 1834, only free white men could vote, and free negroes were exempted from military duty in time of peace and from paying a free poll tax.

Section 2. Laws may be passed excluding from the right of suffrage persons who may be convicted of infamous crimes.

Section 3. Electors shall, in all cases, except treason, felony, or breach of the peace, be privileged from arrest or summons, during their attendance at elections, and in going to and returning from them.

Section 4. In all elections to be made by the General Assembly, the members thereof shall vote viva voce, and their votes shall be entered on the journal. All other elections shall be by ballot.

Article V.

IMPEACHMENTS.

Section 1. The House of Representatives shall have the sole power of impeachment.

Section 2. All impeachments shall be tried by the Senate. When sitting for that purpose, the Senators shall be upon oath or affirmation, and the Chief Justice of the Supreme Court, or, if he be on trial, the Senior Associate Judge, shall preside over them. No person shall be convicted without the concurrence of

two-thirds of the Senators sworn to try the officer impeached.

Constitution 1834, says nothing as to who shall preside over the Senate in impeachment trials.

Section 3. The House of Representatives shall elect, from their own body three members, whose duty it shall be to prosecute impeachments. No impeachment shall be tried until the Legislature shall have adjourned sine die, when the Senate shall proceed to try such impeachment.

Section 4. The Governor, Judges of the Supreme Court, Judges of the Inferior Courts, Chancellors, Attorneys for the State, Treasurer, Comptroller and Secretary of State, shall be liable to impeachment, whenever they may, in the opinion of the House of Representatives, commit any crime in their official capacity which may require disqualification; but judgment shall only extend to removal from office, and disqualification to fill any office thereafter. The party shall, nevertheless, be liable to indictment, trial, judgment and punishment according to law. The Legislature now has, and shall continue to have, power to relieve from the penalties imposed, any person disqualified from holding office by the judgment of a Court of Impeachment.

The last sentence is not in Constitution 1834; it was the outcome of the deliberations of the Convention of 1870 on the case of Judge Thomas N. Frazier.

Section 5. Justices of the Peace, and other civil officers, not hereinbefore mentioned, for crimes or mis-

demeanors in office, shall be liable to indictment in such courts as the Legislature may direct; and, upon conviction, shall be removed from office by said court, as if found guilty on impeachment; and shall be subject to such other punishment as may be prescribed by law.

Article VI.

JUDICIAL DEPARTMENT.

Section 1. The judicial power of this State shall be vested in one Supreme Court, and in such Circuit, Chancery and other inferior Courts as the Legislature shall, from time to time, ordain and establish; in the Judges thereof, and in Justices of the Peace. The Legislature may also vest such jurisdiction in Corporation Courts as may be deemed necessary. Courts to be holden by Justices of the Peace may also be established.

The words "Circuit" and "Chancery" do not appear in Constitution 1834.

Section 2. The Supreme Court shall consist of five judges, of whom not more than two shall reside in any one of the grand divisions of the State. The judges shall designate one of their own number who shall preside as Chief Justice. The concurrence of three of the judges shall, in every case, be necessary to a decision. The jurisdiction of this court shall be appellate only, under such restrictions and regulations as may, from time to time, be prescribed by law; but it may possess such other jurisdiction as is now con-

ferred by law on the present Supreme Court. Said court shall be held at Knoxville, Nashville and Jackson.

Constitution 1834 did not provide for a Chief Justice or name the towns in which the Court should be held.

Section 3. The Judges of the Supreme Court shall be elected by the qualified voters of the State. The Legislature shall have power to prescribe such rules as may be necessary to carry out the provisions of Section 2, of this article. Every Judge of the Supreme Court shall be thirty-five years of age, and shall, before his election have been a resident of the State for five years. His term of service shall be eight years.

Under Constitution 1834, as amended in 1853, judges of the Supreme Court were elected by the people for eight years, before that by the Legislature for twelve years, and no residence qualification was prescribed.

Section 4. The Judges of the Circuit and Chancery Courts, and of other inferior courts, shall be elected by the qualified voters of the district or circuit to which they are to be assigned. Every judge of such courts shall be thirty years of age, and shall, before his election, have been a resident of the State for five years, and of the circuit or district one year. His term of service shall be eight years.

The words "Circuit" and "Chancery" not in Constitution 1834.

Section 5. An Attorney General and Reporter for the State, shall be appointed by the Judges of the Supreme Court, and shall hold his office for a term of

eight years. An Attorney for the State for any circuit or district, for which a judge having criminal jurisdiction shall be provided by law, shall be elected by the qualified voters of such circuit or district, and shall hold his office for a term of eight years, and shall have been a resident of the State for five years, and of the circuit or district one year. In all cases where the Attorney for any district fails or refuses to attend and prosecute according to law, the court shall have power to appoint an attorney pro tempore.

The word "Reporter" is not in Constitution 1834. The Attorney General and the District Attorneys were elected for six years.

Section 6. Judges and Attorneys for the State may be removed from office by a concurrent vote of both Houses of the General Assembly, each House voting separately; but two-thirds of the members to which each House may be entitled, must concur in such vote. The vote shall be determined by ayes and noes, and the names of the members voting for or against the Judge or Attorney for the State together with the cause or causes of removal, shall be entered on the journals of each House respectively. The Judge or Attorney for the State, against whom the Legislature may be about to proceed, shall receive notice thereof accompanied with a copy of the causes alleged for his removal, at least ten days before the day on which either House of the General Assembly shall act thereupon.

Constitution 1834 required the concurrence of two-thirds "of all the members elected to each house" instead of "two-

thirds of the members to which each house may be entitled."

Section 7. The Judges of the Supreme or Inferior Courts shall, at stated times, receive a compensation for their services, to be ascertained by law, which shall not be increased or diminished during the time for which they are elected. They shall not be allowed any fees or perquisites of office nor hold any office of trust or profit under this State or the United States.

Section 8. The jurisdiction of the Circuit, Chancery, and other inferior courts, shall be as now established by law, until changed by the Legislature.

Constitution 1834 provided that: "The jurisdiction of such inferior courts as the Legislature may from time to time, establish, shall be regulated by law."

Section 9. Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law.

Section 10. The Judges or Justices of inferior courts of law and equity, shall have power in all civil cases, to issue writs of certiorari, to remove any cause or the transcript of the record thereof, from any inferior jurisdiction, into such court of law, on sufficient cause, supported by oath or affirmation.

Section 11. No Judge of the Supreme or Inferior Courts shall preside on the trial of any cause in the event of which he may be interested, or where either of the parties shall be connected with him by affinity of consanguinity, within such degrees as may be prescribed by law, or in which he may have been of

counsel, or in which he may have presided in any inferior court, except by consent of all the parties. In case all or any of the Judges of the Supreme Court, shall thus be disqualified from presiding on the trial of any cause or causes, the court, or the Judges thereof, shall certify the same to the Governor of the State, and he shall forthwith specially commission the requisite number of men, of law knowledge, for the trial and determination thereof. The Legislature may by general laws make provision that special Judges may be appointed, to hold any courts the judge of which shall be unable or fail to attend or sit; or to hear any cause in which the Judge may be incompetent.

The last sentence not in Constitution 1834, which instead authorized the Legislature to pass general laws for filling temporarily the places of judges of the Supreme and Inferior Courts, who were disabled by "sickness."

Section 12. All writs and other process shall run in the name of the State of Tennessee and bear test and be signed by the respective clerks. Indictments shall conclude, "against the peace and dignity of the State."

Section 13. Judges of the Supreme Court shall appoint their clerks who shall hold their offices for six years. Chancellors shall appoint clerks and masters, who shall hold their offices for six years. Clerks of the inferior courts, holden in the respective counties or districts, shall be elected by the qualified voters thereof for the term of four years. Any clerk may

be removed from office for malfeasance, incompetency or neglect of duty, in such manner as may be prescribed by law.

Section 14. No fine shall be laid on any citizen of this State that shall exceed fifty dollars, unless it shall be assessed by a jury of his peers, who shall assess the fine at the time they find the fact, if they think the fine should be more than fifty dollars.

Section 15. The different counties of this State shall be laid off, as the General Assembly may direct, into districts of convenient size, so that the whole number in each county shall not be more than twenty-five, or four for every one hundred square miles. There shall be two Justices of the Peace and one Constable elected in each district, by the qualified voters therein, except districts including county towns, which shall elect three Justices and two Constables. The jurisdiction of said officers shall be co-extensive with the county. Justices of the Peace shall be elected for the term of six, and Constable for the term of two years. Upon removal of either of said officers from the district in which he was elected, his office shall become vacant from the time of such removal. Justices of the Peace shall be commissioned by the Governor. The Legislature shall have power to provide for the appointment of an additional number of Justices of the Peace in incorporated towns.

Article VII.

STATE AND COUNTY OFFICERS.

Section 1. There shall be elected in each county, by the qualified voters therein, one Sheriff, one Trustee, one Register; the Sheriff and Trustee for two years, and the Register for four years; but no person shall be eligible to the office of Sheriff more than six years in any term of eight years. There shall be elected for each county by the Justices of the Peace, one Coroner, and one Ranger, who shall hold their offices for two years; said officers shall be removed for malfeasance, or neglect of duty, in such manner as may be prescribed by law.

Section 2. Should a vacancy occur, subsequent to an election, in the office of Sheriff, Trustee, or Register, it shall be filled by the Justices; if in that of the Clerks to be elected by the people, it shall be filled by the courts; and the person so appointed shall continue in office until his successor shall be elected and qualified; and such office shall be filled by the qualified voters at the first election for any of the county officers.

Section 3. There shall be a Treasurer or Treasurers and a Comptroller of the Treasury appointed for the State, by the joint vote of both Houses of the General Assembly, who shall hold their offices for two years.

Under Constitution 1834 the Comptroller was not a constitutional officer.

Section 4. The election of all officers, and the filling of all vacancies not otherwise directed or provided by this Constitution, shall be made in such manner as the Legislature shall direct.

Section 5. Elections for judicial and other civil officers shall be held on the first Thursday in August, one thousand eight hundred and seventy, and forever thereafter on the first Thursday in August next preceding the expiration of their respective terms of service.

The term of each officer so elected shall be computed from the first day of September next succeeding his election. The term of office of the Governor and other executive officers shall be computed from the 15th of January next after the election of the Governor. No appointment or election to fill a vacancy shall be made for a period extending beyond the unexpired term. Every officer shall hold his office until his successor is elected or appointed, and qualified. No special election shall be held to fill a vacancy in the office of Judge or District Attorney, but at the time herein fixed for the biennial election of civil officers; and such vacancy shall be filled at the next biennial election recurring more than thirty days after the vacancy occurs.

Under Constitution 1834 as amended in 1853, Judges and Attorneys General were to be elected on days "separate and apart" from those "prescribed" for elections of other State and County officers.

Article VIII.

MILITIA.

Section 1. All militia officers shall be elected by persons subject to military duty, within the bounds of their several companies, battalions, regiments, brigades and divisions, under such rules and regulations as the Legislature may from time to time direct and establish.

Section 2. The Governor shall appoint the Adjutant-general and his other staff officers; the Major-generals, Brigadier-generals, and commanding officers of regiments, shall respectively appoint their staff officers.

Section 3. The Legislature shall pass laws exempting citizens belonging to any sect or denomination of religion, the tennets of which are known to be opposed to bearing arms, from attending private and general musters.

Article IX.

DISQUALIFICATIONS.

Section 1. Whereas, Ministers of the Gospel are by their profession, dedicated to God and the care of souls, and ought not to be diverted from the great duties of their functions; therefore, no Minister of the Gospel, or Priest of any denomination whatever,

shall be eligible to a seat in either House of the Legislature.

Section 2. No person who denies the being of God, or a future state of rewards and punishments, shall hold any office in the civil department of this State.

Section 3. Any person who shall, after the adoption of this Constitution, fight a duel, or knowingly be the bearer of a challenge to fight a duel, or send, or accept a challenge for that purpose, or be an aider or abettor in fighting a duel, shall be deprived of the right to hold any office of honor or profit in this State, and shall be punished otherwise, in such manner as the Legislature may prescribe.

Article X.

OATHS—BRIBERY OF ELECTORS—NEW COUNTIES.

Section 1. Every person who shall be chosen or appointed to any office of trust or profit under this constitution, or any law made in pursuance thereof, shall, before entering upon the duties thereof, take an oath to support the constitution of this State, and of the United States, and an oath of office.

Section 2. Each member of the Senate and House of Representatives, shall, before they proceed to business, take an oath or affirmation to support the constitution of this State, and of the United States, and also the following oath: "I, ————————, do solemnly swear (or affirm) that as a member of this

General Assembly, I will, in all appointments, vote without favor, affection, partiality, or prejudice, and that I will not propose or assent to any bill, vote or resolution, which shall appear to be injurious to the people, or consent to any act or thing whatever that shall have a tendency to lessen or abridge their rights and privileges, as declared by the constitution of this State."

Section 3. Any elector who shall receive any gift or reward for his vote, in meat, drink, money, or otherwise, shall suffer such punishment as the laws shall direct. And any person who shall directly or indirectly give, promise or bestow any such reward to be elected, shall thereby be rendered incapable, for six years, to serve in the office for which he was elected, and be subject to such further punishment as the Legislature shall direct.

Section 4. New counties may be established by the Legislature, to consist of not less than two hundred and seventy-five square miles, and which shall contain a population of seven hundred qualified voters; no line of such county shall approach the Court house of any old county, from which it may be taken nearer than eleven miles, nor shall said old county be reduced to less than five hundred square miles. But the following exceptions are made to the foregoing provisions, viz: New counties may be established by the present or any succeeding Legislature, out of the following territory, to-wit: Out of that portion of Obion county

which lies west of low water mark of Reel Foot Lake: out of fractions of Sumner, Macon and Smith counties; but no line of such new county shall approach the Court house of Sumner or Smith counties nearer than ten miles, nor include any part of Macon County lying within nine and a half miles of the Court house of said county; nor shall more than twenty square miles of Macon County, nor any part of Sumner County lying due west of the western boundary of Macon County, be taken in the formation of said new county: out of fractions of Grainger and Jefferson counties, but no line of such new county shall include any part of Grainger county North of Holston river; nor shall any line thereof approach the Court house of Jefferson County nearer than eleven miles. Such new county may include any other territory which is not excluded by any general provision of this constitution: out of fractions of Jackson and Overton Counties but no line of such new county shall approach the courthouse of Jackson or Overton counties nearer than ten miles, nor shall such county contain less than four hundred qualified voters, nor shall the area of either of the old counties be reduced below four hundred and fifty square miles: out of fractions of Roane, Monroe and Blount Counties, around the town of Loudon; but no line of such new county shall ever approach the towns of Maryville, Kingston, or Madisonville nearer than eleven miles, except that on the south side of Tennessee River, said lines may

approach as near as ten miles to the courthouse of Roane County.

The Counties of Lewis, Cheatham, and Sequatchie, as now established by legislative enactments, are hereby declared to be constitutional counties. No part of Bledsoe County shall be taken to form a new county, or a part thereof, or be attached to any adjoining county.

That portion of Marion County included within the following boundaries, beginning on the Grundy and Marion County line, at the Nick-a-jack Trace, and running about six hundred yards west of Ben Posey's, to where the Tennessee Coal Railroad crosses the line, running thence South East through the Pocket, near William Sumner's crossing the Battle Creek Gulf at the corner of Thomas Wooten's field, thence running across the Little Gizzard Gulf at Raven Point, thence in a direct line to the bridge crossing the Big Fiery Gizzard, thence in a direct line to the mouth of Holy Water Creek, thence up said creek to the Grundy County line, and thence with the said line to the beginning; is hereby detached from Marion County, and attached to the County of Grundy.

No part of a county shall be taken off to form a new county or a part thereof without the consent of two-thirds of the qualified voters in such part taken off; and, where an old county is reduced for the purpose of forming a new one, the seat of justice in said old county shall not be removed without the concurrence

of two-thirds of both branches of the Legislature, nor shall the seat of justice of any county be removed without the concurrence of two-thirds of the qualified voters of the county. But the foregoing provision requiring a two-thirds majority of the voters of a county to remove its county seat, shall not apply to the counties of Obion and Cocke.

The fractions taken from old counties to form new counties, or taken from one county and added to another, shall continue liable for their pro rata of all debts contracted by their respective counties prior to the separation, and be entitled to their proportion of any stocks or credits belonging to such old counties.

Constitution 1834 allowed new counties of not less than 350 square miles and not less than 450 qualified voters but prohibited the reduction of old counties to less than 625 square miles, no line of a new county to approach the Court house of an old one nearer than twelve miles.

Section 5. The citizens who may be included in any new county shall vote with the county or counties, from which they may have been stricken off, for members of Congress, for Governor and for members of the General Assembly until the next apportionment of members of the General Assembly, after the establishment of such new county.

Article XI.

MISCELLANEOUS PROVISIONS.

Section 1. All laws and ordinances now in force and in use in this State, not inconsistent with this

constitution, shall continue in force and use until they shall expire or be altered, or repealed by the Legislature. But ordinances contained in any former constitution or schedule thereto, are hereby abrogated.

The last sentence not in Constitution 1834.

Section 2. Nothing contained in this constitution shall impair the validity of any debts or contracts, or affect any rights of property, or any suits, actions, rights of action, or other proceedings in courts of justice.

Section 3. Any amendment or amendments to this constitution may be proposed in the Senate or House of Representatives, and if the same shall be agreed to by a majority of all the members elected to each of the two Houses, such proposed amendment or amendments shall be entered on their journals, with the yeas and nays thereon, and referred to the General Assembly then next to be chosen; and shall be published six months previous to the time of making such choice; and if in the General Assembly then next chosen as aforesaid, such proposed amendment or amendments shall be agreed to by two-thirds of all the members elected to each House, then it shall be the duty of the General Assembly to submit such proposed amendment or amendments to the people, in such manner and at such time as the General Assembly shall prescribe. And if the people shall approve and ratify such amendment or amendments by a majority of all the citizens of the State voting for Representatives,

voting in their favor, such amendment or amendments shall become a part of this constitution. When any amendment of amendments to the Constitution shall be proposed in pursuance of the foregoing provisions, the same shall, at each of said sessions, be read three times on three several days in each House. The Legislature shall not propose amendments to the Constitution oftener than once in six years. The Legislature shall have the right, at any time, by law, to submit to the people the question of calling a Convention to alter, reform or abolish this Constitution, and when, upon such submission, a majority of all the votes cast shall be in favor of said proposition, then delegates shall be chosen, and the Convention shall assemble in such mode and manner as shall be prescribed.

The last sentence not in Constitution 1834.

Section 4. The Legislature shall have no power to grant divorces, but may authorize the courts of justice to grant them for such causes as may be specified by law, but such laws shall be general and uniform in their operation throughout the State.

Section 5. The Legislature shall have no power to authorize lotteries for any purpose, and shall pass laws to prohibit the sale of lottery tickets in this State.

Section 6. The Legislature shall have no power to change the names of persons, or to pass acts adopting or legitimatizing persons; but shall, by general laws, confer this power on the courts.

Section 7. The Legislature shall fix the rate of interest, and the rate so established shall be equal and uniform throughout the State; but the Legislature may provide for a conventional rate of interest, not to exceed ten per centum per annum.

Constitution 1834 did not authorize a conventional rate of interest.

Section 8. The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals, inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunities or exemptions, other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law. No corporation shall be created or its powers increased or diminished by special laws; but the General Assembly shall provide by general laws, for the organization of all corporations, hereafter created, which laws may, at any time, be altered or repealed, and no such alterations or repeal shall interfere with, or divest rights which have become vested.

Constitution 1834 did not contain the last sentence, but provided that: "The Legislature shall have power to grant such charters of incorporation as they may deem expedient for the public good."

Section 9. The Legislature shall have the right to vest such powers in the courts of justice, with regard to private and local affairs, as may be expedient.

Section 10. A well regulated system of internal improvement is calculated to develop the resources of the State and promote the happiness and prosperity of her citizens; therefore, it ought to be encouraged by the General Assembly.

Section 11. A homestead, in the possession of each head of a family and the improvements thereon, to the value, in all, of one thousand dollars, shall be exempt from sale under legal process during the life of such head of a family, to inure to the benefit of the widow, and shall be exempt during the minority of their children occupying the same. Nor shall said property be alienated without the joint consent of husband and wife, when that relation exists. This exemption shall not operate against public taxes, nor debts contracted for the purchase money of such homestead, or improvements thereon.

This section not in Constitution 1834.

Section 12. Knowledge, learning and virtue, being essential to the preservation of Republican institutions, and the diffusion of the opportunities and advantages of education throughout the different portions of the State, being highly conducive to the promotion of this end, it shall be the duty of the General Assembly in all future periods of this Government, to cherish literature and science. And the fund called the common school fund, and all the lands and proceeds thereof, dividends, stocks, and other property of every description whatever, heretofore by law appro-

priated by the General Assembly of this State for the use of common schools, and all such as shall hereafter be appropriated, shall remain a perpetual fund, the principal of which shall never be diminished by Legislative appropriation; and the interest thereof shall be inviolably appropriated to the support and encouragement of common schools throughout the State, and for the equal benefit of all the people thereof; and no law shall be made authorizing said fund or any part thereof to be diverted to any other use than the support and encouragement of common schools. The State taxes, derived hereafter from polls shall be appropriated to educational purposes, in such manner as the General Assembly shall, from time to time, direct by law. No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school. The above provision shall not prevent the Legislature from carrying into effect any laws that have been passed in favor of the Colleges, Universities, or Academies, or from authorizing heirs or distributees to receive and enjoy escheated property under such laws as may be passed from time to time.

There are two new provisions in this section, viz.: the appropriation of poll taxes to educational purposes, and the prohibition of the co-education of white and negro children.

Section 13. The General Assembly shall have power to enact laws for the protection and preservation of game and fish, within the State, and such laws

may be enacted for and applied and enforced in particular counties or geographical districts, designated by the General Assembly.

Section 14. The intermarriage of white persons with negroes, mulattoes, or persons of mixed blood, descending from a negro to the third generation, inclusive, or their living together as man and wife in this State is prohibited. The Legislature shall enforce this section by appropriate legislation.

Section 15. No person shall, in time of peace, be required to perform any service to the public on any day set apart by his religion as a day of rest.

Section 16. The declaration of rights, hereto prefixed, is declared to be a part of the Constitution of this State, and shall never be violated on any pretense whatever. And to guard against transgression of the high powers we have delegated, we declare that everything in this Bill of Rights contained, is excepted out of the general powers of the government, and shall forever remain inviolate.

Section 17. No county office created by the Legislature shall be filled otherwise than by the people or the County Court.

INDEX.

Acts of Assembly, caption and contents, 303.
Amendments of 1853, 213; of 1865, 283; proposed in 1904, 327; how made, 309.
Anderson, Joseph, 106, 131, 232.
Admission of Tennessee to the Union, 117.
Attorneys General, 137, 204, 213. 308, 313.

Bailey, James E., 258.
Balch, Hezekiah, 51.
Bancroft, George, on Watauga Association, 16, 20.
Barrow, Washington, 273.
Barton, Samuel, 45.
Bassett, John S., 82, 84, 85, 86, 87, 88, 89, 90, 91.
Bate, W. B., 258, 260.
Baxter, John, 298, 316.
Bell, John, 234, 235, 236, 237, 266, 267.
Berkeley, Sir William, 78.
Blizzard, A., 299.
Blount, Mary G., 123.
Blount, Willie, 192, 195, 210, 232. 242.
Blount, William, 106, 121, 132.
Blount College, 110.
Bonds State, when may be issued, 305.
Brown, Aaron V., 234.
Brown, Jacob, 6, 9.
Brown, John C., 267, 298.
Brown, Neill S., 267, 298, 316, 319.
Brownlow, W. G., 267, 285, 295.
Burton, John W., 299, 319.

Caldwell, John, 215.
Campbell, A. W., 299.
Campbell, David, 47, 60, 106.
Campbell, Geo. W., 186, 231.
Cannon, Newton, 191.
Capital, State, 158, 212.
Captains Company, as Civil Division, 205.
Carrick, Samuel, 111.
Carroll, William, 179, 192, 193, 234, 242.
Carter, John, 25.
Carter, Landon, 47, 126, 132.
Carter, W. B., 191.
Caruthers, Abram, 228.
Caruthers, R. L., 225, 267, 269.
Catron, John, 186, 233.
Class Legislation, 331-343.
Claiborne, W. C. C., 131.
Clarksville, Republic of, 43.
Craig, E. B., 262.
Craighead, Thomas, 111.
Census, of 1795, 115; of 1830, 187.
Cession Act, 1784, 46, repealed, 48; Act of 1789, 104.
Coal Mining, 229.
Cobbs, R. L., 226.
Cocke, William, 47, 49, 58, 60, 120, 131.
Colleges, 110.
Common Law, in Tennessee, 155.
Comptroller, 229.
Congress, passes on Tennessee Constitution, 117.
Constitution, of Frankland, 52; of North Carolina, 99; of 1796, 130; of 1834, 191; of 1870, 294.
Conventions, North Carolina, 99; Franklin, 47, 48, 50; of 1796, 130; of 1834, 191; of 1870, 294; of 1865, 282.
Cooper, Edmund, 278.
Cooper, W. F., 226.

Corporations, 209, 310.
Courts of Tennessee Chancery, 166, 167; Circuit, 165; County, 168, 223, 329; Superior, 150, 165, 224; Supreme, 165, 204, 308; of North Carolina, 91, 98, 101.
Criminal Laws of Tennessee, 178.
Cumberland College, 111.
Cumberland Settlement, 34; Compact, 35; Judges of, 45; Incorporated in North Carolina, 45.

Deaderick, W. V., 299.
Debt, imprisonment for, abolished, 154.
Debt, State, 249, 250, 251, 252; settled, 260-261.
Dibrell, G. G., 299.
Dickinson, J. M., 258.
Divisions of the State, 222.
Divorce, 176, 208.
Doak, Samuel, 110.
Donelson, John, 34; Stockley, 107.
Dueling, 181, 207.

East, Ed. H., 278.
East Tennessee, for Separate Statehood, 277, 290; opposition to secession, 275; whig stronghold, 3, 238.
Eaton, John H., 234.
Emancipation, 214, 216, 220.
Election Commissioners, 286, 346.
Embree, E., 215.
Ewin, Andrew, 45.

Federalists, oppose admission of Tennessee, 116.
Fentress, James, 299.
Fiske, Moses, 16, 22, 44.
Fogg, F. B., 191.
Fourteenth Amendment, U. S. Constitution, 290.
Fowler, Joseph S., 278.

Franklin, State of, 46; Conventions of, 47, 48, 50; Repeal of Cession Act, 48; Temporary Constitution of, 49; Legislation of, 62, 63; Financial System, 63; Memorial to North Carolina, 66; Legality of its Acts in North Carolina, 73; In Tennessee, 73; Legislation of North Carolina after repeal of Cession Act, 48, 49, 50, 59, 62; Purposes of the people, 71.
Freeland, George, 45.
Free Negroes, number of, in 1795, 115; voters under Constitution of 1796, 183; Disfranchised, 196, 213; Legislation in regard to, 183, 221.
French Broad, Republic of, 75.
Fulkerson, P. G., 299, 346.
Fundamental Constitutions of Carolina, 83, 84, 86.

Gallatin, A., 118.
Gardner, John A., 299.
Gibson, Henry R., 299, 315, 323, 346.
Goodpasture, A. V., 7, 114.
Governor, Qualifications of, in North Carolina, 148; in Tennessee, 147, 202, 306.
Green, Nathan, 186, 225.
Greeneville College, 110; Convention of 1861, 276.
Grundy, Felix, 231.

Habeas Corpus, 302.
Hamilton District, 106.
Hard Labour, Treaty of, 4.
Harris, Isham G., 258, 267, 269, 271, 272.
Haskell, W. T., 238.
Hatton, Robert, 267.
Hawkins, Alvin, 259.
Haynes, Landon C., 267, 276.
Haywood, John, on Watauga Association, 17; on James Robertson, 32; Judge, 186.

Heiskell, Jos. B., 227, 298, 320, 322.
Henderson, Richard, Treaty at Sycamore Shoals, 8; at Nashville, 38.
Henry, G. A., 267, 273, 276.
Holston River, 1; Settlers South of, 6; North of, 7.
Homestead, 310.
House, John F., 298.
Houston, Rev. Samuel, 47, 51, 52.
Houston, Samuel, 234.
Humphreys, W. H., 191.
Huntsman, Adam, 171.

Impeachments, under Constitution 1870, 307.
Imprisonment for Debt, 101, 153, 154.
Insane Asylum, 185.
Intermarriage of Races, 311.
Internal Improvements, 209, 241; Acts in aid of, 1823, 243; 1830, 244; 1831, 244; 1836, 245; 1839, 246; 1848, 247; 1852, 247.

Jackson, Andrew, 130, 131, 230.
Jackson, Howell E., 258.
Jefferson, Thomas, on Constitution of 1796, 159.
Johnson, Andrew, 256, 267, 278-284.
Johnson, Cave, 267.
Johnson, Sir William, 5.
Jones, Geo. W., 299; James C., 238; Thomas M., 299, 319; Willie, 13.
Jonesboro, Franklin Conventions at, 47, 49.
Judges, Constitution of 1796, 186; Impeachments, 173.
Judicial System of North Carolina, 91, 98, 101; Tennessee Constitution 1796, 148, 165; Constitution 1834, 203; Constitution 1870, 308.
Justice of the Peace, North Carolina, 93, 94, 98, 102; Tennessee, 151, 205.

Kennedy, D. N., 299.
Key, D. M., 299.
King, Theo. F., 262.
Kirkpatrick, S. J., 299, 321.
Knoxville, First Capital, 158.
Knoxville, Convention of 1861, 276.
Ku Klux Klan, 294.

Land Tax; Constitution 1796, 138, 142, 164; Constitution 1834, 199; Constitution 1870, 304.
Legislature, North Carolina, 82, 90, 91, 97, 99; Tennessee, Constitution 1796, 135; Constitution 1834, 197; Constitution 1870, 303.
Lewis, W. B., 233.
Lindsay, Isaac, 45.
Liquor Laws, 336.
Local Government in Tennessee, 330-343.
Lochaber, Treaty of, 5.
Locke, John, Fundamental Constitutions, 83.
Lotteries, 195, 208.
Lundy, Benjamin, 215.
Lurton, H. H., 258.

Marks, A. S., 254.
Marshall, John, 267.
Maulding, James, 45.
Maynard, Horace, 267, 278.
Meigs, R. J., 226, 227, 267.
Merchants Tax, 304.
Mero District, 106.
Middle Tennessee opposes Statehood, 113; probable cause, 114.
Militia, how called out, 306.
Mississippi, Right to Navigate, 114, 156.
Molloy, Thomas, 45.

Municipalities, 344.
McClung, Charles, 131, 133.
McNairy, John, 106, 130.
McKinney, R. J., 191, 225.
McLin, William, 132.
McMillin, Benton, 262.
McMinn, Joseph, 131, 179, 192, 193, 242.
Nashville, Capital, 212.
Negroes, Free, 183, 203; allowed to vote under Constitution 1796, 148; Disfranchised, 213.

Nelson, Thos. A. R., 267.
Netherland, John, 267, 298, 315.
Nicholson, A. O. P., 226, 267, 299, 325, 346.
North Carolina, First Government, 77; Council, under Proprietors, 82, 88, 89; under Royal Government, 97; State 100; Courts under Proprietors, 85, 89, 91; under Royal Government, 98; State, 101; Legislature under Proprietors, 82, 90, 91; under Royal Government, 97: State, 99; Chancery Court, 93, 98; Becomes a Crown Province, 96; Governor, 85, 88, 100; Constitution, analysis of, 99; Laws and Institutions pass to Tennessee, 103, 156; Fundamental Constitutions, 83, 84, 86; Fiscal Officers of the Province, 94.

Ordinance, of 1784, 113; of 1787, 104.
Outlaw, Alexander, 131.
Overton, John, 186, 233, 234.

Penitentiary, 179, 180, 181.
Peyton, Balie, 267.
Phelan, James, 9, 143, 353.
Political History, 230.
Polk, James K., 234, 237.
Poll Tax, 138, 316, 316.

Porter, James D., 251, 252, 258, 298, 300.
Press, Freedom of, under Constitution, 1796, 153.
Printer Public, office created, 112.
Property Qualifications, in North Carolina, 99, 100; in Tennessee, 135, 137, 148, 197.
Proprietary Colonies, 79.
Public Improvements, 182.
Putnam, A. W., 38, 41, 42, 44; quoted as to powers and duties of Cumberland officers, 35.

Railroads, 229.
Ramsey, J. G. M., on Watauga Association, 16.
Reconstruction in Tennessee, 278-293.
Reese, W. B., 225.
Religious Liberty, in North Carolina under Constitution of 1776, 100; in Tennessee under Constitution of 1796, 151, 161.
Removal of Judges, 350.
Reporter, State, 227.
Rhea, John, 132.
Robertson, Charles, 26; James, Watauga Leader, 25; Character, 32; Founder of Cumberland, 32; Relations with Henderson, 34; Correspondence with Spaniards, 72; in Convention of 1796, 130.
Rodgers, S. R., 282.
Roosevelt, Theodore, 4, 10, 19, 27, 30.
Rounsevall, David. 45.
Rutherford, Griffith, 107.

Salaries, under Constitution 1796, 137.
Savage, John H., 257, 258.
Schools, Fund, 310; Lands, 128; Public Schools, 183, 189, 211, 310.
Scotch Irish 3, 19.
Scott, Edward, 226.

Seay, Geo. E., 299.
Secession of Tennessee, 264; Resolution, 273.
Senter, D. W. C., 295, 296.
Sevier, John, Leader in Watauga, 25; Advises abandonment Franklin movement, 49; President Franklin Conventions, 47, 49; Governor of Franklin, 62; Captured, 62; Correspondence with Spaniards, 72;
Shaftesbury, Earl of, 83.
Shelby, Evan, 60.
Six Nations, 5.
Slaves and Slavery, 215, 219.
Smith, Daniel, 106, 132.
Snodgrass, D. L., 255.
Southwest Territory, 104, see Territory south of the Ohio.
Special Legislation, 331.
Staley, W. B., 318.
Stanwix, Fort, Treaty of, 5.
State Debt, see Debt, State.
Stuart, Indian Agent, 4, 8.
Sycamore Shoals, Treaty of, 8.

Tatum, Howell, 126.
Taylor, John M., 299; Parmenas, 107.
Taxation, under Constitution 1796, 138, 164; under Constitution 1834, 199; under Constitution 1870, 304.
Tennessee, Admitted to the Union, 117.
Territory, South of the Ohio, Formation of, 104; Government, 105; Officers of, 106; Legislature of, 107; Population of, 115; Expenses, 125.
Territory, Northwest, 104.
Thompson, W. V., 346.
Tipton, J., 64, 132.
Titus, Ebenezer, 45.
Totten, A. W. O., 273.
Township Government, 331.
Transylvania, Purchase, 8; Republic of, 39.

University of Tennessee, 345.

Virginia, Grants Lands in Tennessee, 5.
Vote, on Secession, 270, 275; on Statehood, 113.
Voters, under Constitution 1796, 148; under Constitution 1834, 202; under Constitution 1870, 305, 307.

Washington, College, 110; District, first, 12; second, 106; President, letter of, to Congress, 135.
Watauga Association, Formed, 9; Leases Lands, 7; Purchases Lands, 8; Government, 9; Court of five, 10, 11; Committee of Thirteen, 11; Petition to North Carolina, 9; Action of Council of Safety, 13; of Provincial Congress, 13, 14; Statements of Historians as to Government, 15-17; Followed Laws of Virginia, 17; Why the Association was formed, 20-22.
Wells, Haydon, 45.
Western District Opened, 185.
Whig Party, in Tennessee, 238.
White, James, 131; Hugh L. 186, 234.
Whitesides, J. H., 226.
Williams, John, 233.
Williamson, W. H., 299.
Wilson, S. F., 254, 259.
Winchester, James, 107.
Wright, Archibald, 226; John V., 259; Luke E., 258.